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DEPARTMENT OF THE INTERIOR

FRANKLIN K. LANE, SECRETARY

BUREAU OF MINES

VAN. H. MANNING, DIRECTOR

ABSTRACTS OF CURRENT DECISIONS

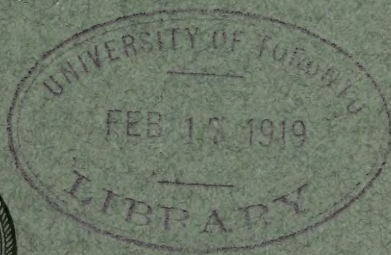
ON

MINES AND MINING

REPORTED FROM
JANUARY TO MAY, 1918

BY

J. W. THOMPSON



WASHINGTON
GOVERNMENT PRINTING OFFICE
1919

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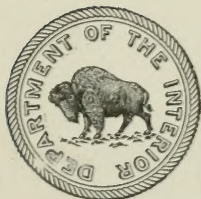
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ABSTRACTS OF CURRENT DECISIONS ON MINES AND MINING, JANUARY TO MAY, 1918.

By J. W. THOMPSON.

MINERALS AND MINERAL LANDS.

MINERALS.

MEANING OF TERM.

The term "minerals" when employed in a conveyance in the State of West Virginia is understood to include every inorganic substance which can be extracted from the earth for profit, whether it be solid, as rock, fire clay, the various metals and coal, or liquid, such as salt, and other mineral waters and petroleum oil and gas.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

TERM INCLUDES OIL AND GAS.

The term "minerals" used to describe the interest in land granted or reserved bona fide includes petroleum oil and natural gas.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

INJUNCTION TO PREVENT REMOVAL.

The removal of ore from the premises of another without his consent will be enjoined.

Barnes v. Esch (Oregon), 169 Pacific, 512, p. 513.

TITLE TO MEXICAN BULLION—JURISDICTION OF FEDERAL COURTS TO DETERMINE.

Where bullion within the jurisdiction of the Mexican Government was seized, condemned, and sold for war supplies by the Constitutionalist forces in the revolution acting under authority from Gen. Carranza, claiming to be the provisional President of the Republic of Mexico, a United States district court of Texas, into which State the bullion has been imported from Mexico, has jurisdiction to try and adjudge as to the validity of the title acquired by

and through the seizure, appropriation, and sale by the Carranza forces as against an American citizen claiming ownership of such bullion prior to its seizure.

Ricaud v. American Metal Co., 38 Supreme Ct. Rep. 212, p. 213.

TITLE OF AMERICAN CITIZEN TO MEXICAN BULLION.

The seizure, condemnation, and sale of bullion in Mexico sold for war supplies by the constitutionalist forces, acting under authority of the provisional president of the Republic of Mexico, had the effect of divesting the title to and ownership by a citizen of the United States who was not in or a resident of the Republic of Mexico at the time of the seizure, condemnation, and sale.

Ricaud v. American Metal Co., 38 Supreme Ct. Rep. 212, p. 214.

MINERAL LANDS.

MINERAL CHARACTER—QUESTION OF FACT.

Whether a particular parcel of land is mineral or nonmineral in character presents a question of fact dependent for its solution upon evidence dehors the record.

Thomas v. Horst (Montana), 169 Pacific, 731, p. 732.

SUBSEQUENT DISCOVERY OF MINERALS—EFFECT ON TITLE.

Under the land-grant act of July 24, 1864 (31 Stats., 365), a patent to the Northern Pacific Railroad Company passes the legal title to the land free from the contingency of future discovery of minerals in the land conveyed.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

CUTTING TIMBER—LIABILITY—DEFENSE.

By the act of March 3, 1891 (26 Stats., 1093), in any criminal prosecution or civil action by the United States for a trespass on the public timber lands in the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada and the Territory of Utah. it shall be a defense if the defendant shall show that the timber was cut or removed for use in the State or Territory by a resident thereof for mining and for certain other purposes, and that it has not been transported out of such State or Territory.

Hammond v. United States, 246 Federal 40, p. 45.

PROSECUTION FOR CUTTING TIMBER—COURT'S REFUSAL TO DIRECT VERDICT.

In a prosecution for unlawful cutting and removing timber from public land, where the evidence introduced by the defendant tended

to show that the lands were mineral lands within the meaning of the act of June 3, 1878 (20 Stats., 88), and that the person cutting the timber had complied with the provisions of the act and with the rules established thereunder by the Secretary of the Interior, the court may properly refuse to direct a verdict for the defendant where the defendant justified the cutting under the act of June 3, 1878 (20 Stats., 88), and where the evidence showed trespasses committed subsequent to the amendatory act of March 3, 1891 (26 Stats. 1093).

Hammond v. United States, 246 Federal 40, p. 45.

SALE AND CONVEYANCE.

GRANTS BY CONGRESS—POLICY AS TO MINERAL LANDS.

In the legislation concerning the public lands it has been the purpose of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines and to withhold mineral lands from disposal save under laws specially including them. It has been the policy of the Government at all times to reserve the mines for the use of the United States.

United States v. Sweet, 38 Supreme Ct. Rep. 193.

VALIDITY OF PATENT.

A patent issued for public or mineral lands not open to entry under the act by virtue of which it is issued is absolutely void.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

SALE OF MINERAL LANDS—BREACH OF COVENANT—DAMAGES.

In an action for a breach of a covenant of a deed reserving and excepting the minerals, a recovery of nominal damages only can be had for the breach of the covenant of seisin where there has been no eviction or actual damages shown, and where there is no allegation that the owner of the underlying minerals has entered upon the surface, or that any substantial damages have resulted from the alleged breach of the covenants of the deed.

Hammaistedt v. Bakely (Iowa), 166 Northwestern 729, p. 731.

CONSTRUCTION OF DEED AND AGREEMENT TO DEVELOP MINE—CONDITION OR COVENANT.

The owner of certain mineral lands conveyed the same to a nephew by ordinary deed of conveyance. At the same time the parties entered into an agreement providing, among other things, that the grantee in the deed would undertake the opening up and development of the property as a mining claim at his own expense; and

providing that the grantor should during his lifetime occupy the premises as a place of residence and obtain therefrom such income as might be necessary to afford him a comfortable living; and that during his lifetime the property should be developed in a proper and systematic manner as a mining claim for the benefit of both; and providing that the property may be sold at a sum in excess of the amount expended by the grantee in the deed who was to be reimbursed for all moneys expended by him in the development of the property, together with interest thereon, and receive the entire proceeds of any such sale except an amount necessary to provide for the care and maintenance of the grantor during his lifetime. The expressed intention was to give the grantee of the premises the entire benefit of all the property conveyed with the right to proceed with the opening up and development thereof and to obtain the full benefit to be derived therefrom except that the grantor of the premises was to be provided for during his lifetime. The deed and the written agreement constitute one instrument and must be construed together. The grantee in the deed wholly failed to develop the property according to the agreement. The agreement construed with the deed does not create a condition subsequent, but is a mere covenant to develop the land. There is an entire absence of apt or appropriate words or expressions usually employed for the purpose of creating a condition subsequent, but the language employed implies a personal covenant and not a condition. The language indicates positively an intention to transfer to the grantee free from condition the full interest and benefit of the property. The expressed intention was not to give the grantee the property on condition that he proceed with the opening up and development thereof, but to transfer to him the full and beneficial right to do so. There was no agreement or understanding that the failure to do the act as promised should be a condition or in any way affect the validity of the deed or entitle the grantor to a reconveyance.

White v. Hendley (Cal. App.), 169 Pacific 710, p. 711.

CONVEYANCE OF MINERAL LANDS—FRAUDULENT REPRESENTATIONS—
RIGHT TO RELIEF.

The owner of a tract of mineral lands sold and conveyed the same to the complainant by a deed "excepting and reserving all coal and minerals underlying all said premises." The purchaser brought an action to recover damages for fraudulent representations made by the seller and his agent in that they represented that they owned all the surface and that the owner of the coal and minerals reserved had no contract for or right to use any of the surface of the land described; that in carrying out the fraudulent scheme the seller and

his agent produced an abstract of the title and fraudulently concealed therefrom the fact that the deed conveying the mineral rights reserved the surface rights to mine the same. The complainant knew at the time of accepting the deed that the mineral rights in the lands purchased had been theretofore conveyed to a third person. The deed conveying the minerals authorized the grantee to enter upon the premises described and use such part of the surface as might be required for properly mining the minerals, including the erection and maintenance of hoisting machinery, air pumps, and escape shafts with all necessary rights of way for roadways and other road facilities. The complainant's theory of fraud and fraudulent representations is not sufficient to authorize a recovery of damages, for the reason that the exception and reservation of the coal and minerals underlying the premises, as stated in his own deed, implies and carries with it the right to enter upon the surface and sink shafts, erect machinery, and provide all necessary facilities for handling and removing the coal after the same has been mined. The fact that the deed conveying the minerals expressly recited and conveyed privileges to the mineral grantee could not give the purchaser of the surface a right to recover, although fraudulent representations were in fact made, and especially where a deed conveying the minerals reserved to the surface owner conditions more favorable than were stated in the deed conveying the surface to the complainant.

Hammastedt v. Bakely (Iowa), 166 Northwestern 729.

FRAUD IN PROCURING DEED—INADEQUACY OF PRICE.

A father owned one half of certain mineral lands and his son owned the other half, subject to the life estate of the father. The father conveyed his interest in the minerals under the entire tract of land, and by request the son joined in the deed. The son could not, six years after the death of the father, maintain an action to set aside the deed on the ground of fraud, where the preponderance of the evidence showed that the son thoroughly understood that he was conveying his interest in the minerals and that his father was to receive \$90 and himself \$10 as the consideration for the conveyance of the minerals. The gross inadequacy of price can not be regarded as a badge of fraud where there were other considerations expressed in the deed.

Virginia Iron, Coal & Coke Co. v. Crigger (Kentucky), 201 Southwestern 298.

RESERVATION OF MINERALS—CONSTRUCTION.

A deed conveyed certain described lands in West Virginia "excepting and reserving all the minerals, coals, together with all necessary rights of way of ingress and egress to and from, over, through,

or under said premises to mine, excavate, and transport the same, excepting a sufficiency of said coals for domestic use." The effect of the deed would be to pass all the estate or interest the grantor then had but for the reservation. If only the term "minerals" had been employed, there could then be no question of the grantor's purpose to reserve all minerals. But the word "coals" immediately following minerals was used presumptively for the same purpose and was evidently used for no other purpose than to define particularly the thing reserved. The term "coals" is here used to qualify the term just preceding it, the two meaning the same thing or being used to designate a single thing. Under the construction given and under the rule that deeds are construed most strongly against the grantor when there is doubt the reservation was of the coal only and not of other minerals.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

RECOVERY OF PUBLIC LANDS—PARTIES.

The United States brought suit to recover land in the State of Florida claimed to be mineral and alleged to have been obtained by false affidavits as to its mineral character. The purchaser, after obtaining title, mortgaged the entire tract to the Central Trust Company of New York, and the mortgage remained unpaid at the date of the commencement of the action. The action to recover the land could not be maintained without making the holder of the mortgage a party defendant. This rule can not be avoided on the ground that the land in controversy constituted an unimportant part of the mortgage security, as constitutional rules and equitable principles protecting property rights apply as well to small amounts of property as to large.

Charleston South Carolina Mining & Manufacturing Co. v. United States, 246 Federal 828.

SURFACE AND MINERALS—OWNERSHIP AND SEVERANCE.

ESTATE IN MINERALS.

Coal deposits or other minerals, when separated by grant or reservation in a deed, are as much of an estate in lands as is the surface of the same land. A conveyance or a reservation of minerals or a mineral estate carries with it the right to use so much of the surface estate as may be reasonably necessary for the proper use of the mineral estate.

Hammastedt v. Bakely (Iowa), 166 Northwestern 729, p. 731.

COAL AND COAL LANDS.

COAL LANDS AS MINERAL LANDS.

Land valuable for coal is mineral land within the meaning of the public-land laws.

United States v. Sweet, 38 Supreme Ct. Rep. 193.

LANDS PURCHASED FROM UNITED STATES—JUDICIAL NOTICE.

Courts take judicial notice of the fact that the coal lands in the State of Utah purchased from the United States were not purchased at a uniform price per acre. Judicial notice is also taken of the fact that the coal lands purchased from the State are not of uniform value and that a blanket assessment for taxation can not be made under constitutional and statutory provisions requiring such assessments on the price paid the United States for coal lands.

Ririe v. Randolph County Assessor (Utah), 169 Pacific 941, p. 942.

LIMITATION TO SINGLE ENTRY.

The United States coal statutes (sec. 2350, Revised Statutes of United States) authorizes but one entry by the same person or association of persons. It is also provided that no association of persons any member of which shall have taken the benefit of the statute, either as an individual or as a member of any other association, shall enter or hold any other land, and no member of any association which shall have taken the benefit of the statute shall enter or hold any other land. The restriction to one entry in the statute must be given full effect. To hold that an individual or any association could make several coal entries provided the total amount of land filed upon did not exceed the maximum allowed by the statute would be to read out of section 2350 the words, "only one entry." This does not deny the right to a person to enter coal lands for a coal company in the absence of evasions as to quantity; but when the coal company has received the benefit of an entry by one person it can not make another entry either by itself or by an agent.

Union Coal & Coke Co. v. United States, 247 Federal 106, p. 107.

CONVEYANCE OF RIGHT TO MINE COAL.

A conveyance of a right to mine, excavate, and remove coal underlying a tract of land is a sale of the coal itself and is a conveyance of an interest in land, and such interest when conveyed is assessable for taxation separately from the surface of the land.

Simmons Coal Co. v. Board of Review, etc. (Illinois), 118 Northeastern 753, p. 754.

SALE AND PURCHASE OF COAL—FRAUD.

The question of whether a company buying coal of a coal-mine operator and selling the same to a coal dealer was guilty of fraud and made false representations as to the quality of the coal is one of fact.

Haddaway Curd Coal Co. v. Breece, Trenton Mining Co. (Mo. App.), 200 Southwestern 104, p. 107.

SALE OF COAL SUPPOSED TO EXIST—LIABILITY.

When parties contract with relation to coal supposed but not known to exist, and the lessee covenants to produce and mine a minimum amount and to pay a minimum royalty within and at stated intervals, his covenant is for a diligent prosecution of the work and to produce the minimum quantity of the minerals if it exists and not whether it exists or not.

National Coal Co. v. Overholt (West Virginia), 94 Southeastern 735, p. 738.

SALE OF COAL—QUANTITY UNKNOWN—LIABILITY FOR MINIMUM PRICE.

Where parties contracted with reference to a coal vein known to exist in a tract of land, but the quantity was unknown and incapable of certain ascertainment and the purchaser covenanted to mine and bring forth a minimum quantity of the product annually, or at other intervals, and to pay a minimum royalty therefor whether mined or not, the contract amounts to a sale of the mineral in the land and the lessee is bound to pay the minimum price whether mined or not and whether it existed or not.

National Coal Co. v. Overholt (West Virginia), 94 Southeastern 735, p. 738.

OPTION FOR EXTENSION—TIME OF EXERCISE.

Where the lease of coal lands with the right to mine and remove the coal in a specified term, and where such lease gave the lessee an option to extend or renew the lease beyond its term for the purpose only of mining and removing coal from adjoining or other lands owned or leased by the lessee over and through the mine and openings in the leased premises and upon terms specified therein the lessee must elect to exercise such right within the term of the lease and he can not do so after the term of the original lease has expired.

National Coal Co. v. Overholt (West Virginia), 94 Southeastern 735, p. 739.

LIEU SELECTIONS—FRAUD—ANNULMENT OF PATENTS.

An action was instituted on behalf of the United States against certain corporations to vacate patents issued for public coal lands on

the ground of fraud. The fraud charged was that the lands covered by the patents were at the several dates of their respective forest lieu selections known as coal lands enterable only under the coal-land act and not enterable as forest lieu selections and that they were at the time known to be such by the respective selectors and entry people whose affidavits to the contrary were alleged to be false. The act of June 3, 1878 (20 Stats., 89), known as the timber and stone act, provides that nothing in the act shall defeat or impair any bona fide claim or authorize the sale of any mining claim or the improvements of any bona fide settler of lands containing gold, silver, cinnabar, copper, or coal. It also provides for filing with the register of the proper district a written statement in duplicate by the entryman to the effect that the land does not, as the applicant believes, contain any valuable deposit of coal, and that the applicant must prove to the satisfaction of the Land Office that the land apparently contains no valuable deposits of coal. In the selection of lieu lands under the act approved June 6, 1900 (31 Stats., 614), such lands shall be confined to vacant, surveyed, nonmineral public lands subject to homestead entry. Mineral lands are not liable to entry and settlement under the homestead law. To justify the annulment of a homestead patent as wrongfully covering coal lands, it must appear that the known conditions at the time of the patent proceeding were plainly such as to engender the belief that the land contained coal deposits of such quality and in such quantity as would render their extraction profitable and justify expenditures to that end.

United States v. Porter Fuel Co., 247 Federal 769, p. 771.

ACTION TO AVOID PATENT—PROOF INSUFFICIENT.

In an action by the United States to avoid patents for coal lands the Government can not succeed where the evidence does not show that the land itself gave evidence of containing valuable deposits of coal at the time of their selection and at the time of the patent proceedings. The proof in the case showed that the sedimentary deposits in the region where the lands were located were cretaceous rock and that they embraced Dakota sandstone, the Macose shales, the Mesa Verde formation, the Lewis shales, and the Laramie sandstone. The Mesa Verde formation is from 700 to 1,000 feet in thickness, and this is the formation in which coal is found in the region where the land was located, and there was some proof to show that this formation extended under these lands; but the evidence also showed that this formation does not always contain coal. The evidence, viewed as a whole, is not convincing that at the time the several entry people made their entries they knew or had good reason to know that the lands in question apparently contained valuable coal deposits and

that, with such knowledge, they deliberately and intentionally swore to the contrary.

United States v. Porter Fuel Co., 247 Federal 769, p. 774.

FRAUDULENT REPRESENTATIONS—RECOVERY OF EXCESS ROYALTIES—
STATUTE OF LIMITATIONS.

A lessee in a coal lease sued the lessor to recover excessive royalties paid on the coal purchased and to be mined on the ground of alleged fraudulent representations or assurances on the part of the lessor as to the acreage and tonnage of coal and by reason of which the lessee was induced to enter into the lease and to agree to pay a minimum price for the coal. There was no warranty of acreage or quantity of coal, but there was a warranty of title and quiet and peaceable possession only. In such case a right of action for excess payments of royalties could be founded alone on fraud and deceit alleged, and such an action would be barred by the statute of limitations in five years from the date of the lease and the date when the cause of action accrued, where no reason is alleged why the deficiency of acreage was or could not be discovered before that time and where there is no allegation of obstruction by the lessor.

National Coal Co. v. Overholt (West Virginia), 94 Southeastern 735, p. 738.

PARTITION—MINING IMPROVEMENTS—ALLOWANCE.

A cotenant who has made improvements on coal lands for the purpose of mining coal can not in an action for partition ask both that the portion of the land on which the improvements are made be assigned to him and that he be allowed the value of the improvements. If partition can be made he is entitled to have the portion of the land on which the improvements are made assigned to him; but if such partition can not be made in justice to all cotenants, he may, when such fact is made to appear, claim an allowance for the improvements made by him.

Alderson v. Horse Creek Coal Land Co. (West Virginia), 94 Southeastern 716, p. 719.

PARTITION—RIGHT OF COTENANT TO IMPROVEMENTS.

The fact that a cotenant located upon a particular part of the land owned by the cotenants and enhanced its value by making improvements for mining and removing coal is a circumstance worthy of consideration by a court charged with the duty of making partition of the land among the cotenants. If in making partition the part so improved can be assigned to the cotenant making the improvements without doing injustice to the other cotenants, such assignment will be made. It is the duty of a court making partition of land among cotenants to cause improvements to be assigned to the respective par-

ties who made them, so far as it can be done consistently with an equitable partition of the estate. The rule applies to improvements made upon coal lands with a view to mining the coal.

Alderson v. Horse Creek Coal Land Co. (West Virginia), 94 Southeastern 716, p. 719.

COAL REMOVED BY COTENANT—PARTITION AND ACCOUNTING.

Where the partition of coal lands can be made so as to give one cotenant the part upon which he has placed improvements and from which he has mined coal, then the question will arise as to an accounting for the coal mined and the improvements made if the cotenant is entitled to compensation therefor. A commission for partition to whom the case was referred to take an account was properly directed to ascertain the amount of coal removed from the land and the value thereof, but if the part of the land from which the coal was taken is assigned to the cotenant taking the same as though the coal still remained in it, then it would be improper to charge him anything for the coal extracted therefrom. But if an equitable partition can not be made by assigning this part of the land to the cotenant making the improvements, this information may be valuable to the court in awarding compensation to the other cotenant for the coal extracted from the common estate.

Alderson v. Horse Creek Coal Land Co. (West Virginia), 94 Southeastern 716, p. 720.

PARTITION—ENJOINING MINING OPERATIONS BY COTENANT.

A court of equity will take jurisdiction at the suit of one cotenant to enjoin waste being committed on the joint estate by another cotenant by the mining and removal of coal therefrom; but where it appears that the mining operations are of such character that the land from which the coal is taken may consistently with the equitable partition of the land be assigned to the cotenant mining the coal therefrom, and it also appears that great damage would result from enjoining the operations of the mining of the coal, a court of equity will refuse such relief and in partitioning the land will assign the part from which coal has been mined to the cotenant who removed the coal therefrom.

Alderson v. Horse Creek Coal Land Co. (West Virginia), 94 Southeastern 716, p. 719.

OIL AND OIL LANDS.

OIL AND GAS AS MINERALS.

Petroleum oil and natural gas are mineral, and in their places are real estate and part of the land.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

OIL AND GAS ARE PARTS OF LAND.

Oil and gas adhere to the land and are parts of it until severed.

Campbell v. Lynch (West Virginia), 94 Southeastern, 739, p. 743.

MINERALS INCLUDE OIL.

The term "minerals" used to describe the interest in land granted or reserved prima facie includes petroleum oil and natural gas unless it appears that the term was employed in a more restrictive sense.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

CONVEYANCE OF OIL AND GAS IN PLACE—CONDITIONS SUBSEQUENT.

By the terms of a written agreement all of the oil, gas, and other minerals beneath the land described were sold and conveyed to the grantee, to have and hold the same on condition that drilling for oil and gas was begun and diligently prosecuted within 30 days from the grant. If oil or other mineral was discovered within that period, the grant was to continue in force for 20 years, or so long as oil could be produced in paying quantities. The grant expressly declared that it evidenced a conveyance of property and not a mere franchise. The agreement by its terms evidenced an absolute sale of all minerals beneath the land subject to the condition subsequent in relation to locating and bringing the oil to the surface; and this being complied with the grant became absolute for the purposes contemplated by the parties for a period of 20 years, or as long as oil in paying quantities could be produced.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 688.

RESERVATION OF MINERALS—OIL NOT INCLUDED.

A deed conveying certain lands in West Virginia, dated May 15, 1891, contained a reservation of minerals as follows: "to have and to hold with all the appurtenances thereto belonging, excepting and reserving all the minerals, coals, together with all the necessary rights of way of ingress and egress to and from, over, through, or under said premises, to mine, excavate, and transport the same, excepting a sufficiency of said coals for domestic use." This clause is a reservation of the coal only, and is not a reservation of the oil and gas.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

CONTRACT OF PURCHASE AND CONVEYANCE—INDEMNITY BOND.

A producer of oil gave to a purchaser and a pipe-line owner transporting the oil a bond to indemnify and save harmless the pipe-line

owner and to entitle the oil producer to receive his proportion of the proceeds of the oil to be delivered into the pipe line, and to save the pipe-line owner harmless as against claims pending and threatened against the oil so delivered and to be delivered to the pipe-line owner. The pipe-line owner under the protection of the bond paid to the oil producer large sums for the oil supplied, but refused to pay for the remainder to the extent of the amount of the bond. The acceptance of the solvent bond under the agreement between the parties was sufficient to bind the pipe-line owner for the payment of oil to the amount stipulated in the bond and render him liable for any deficiency between the amount paid and the face of the bond.

Atlas Oil Co. v. Standard Oil Co., 142 Louisiana, 77 Southern 471, p. 474.

BREACH OF CONTRACT TO DEEPEN WELL—DAMAGES.

An oil and refining company entered into a contract by which the contractee agreed to deepen a well at an agreed price for each foot of increased depth. The company agreed to supply all tools, machinery, and appliances to be used in the performance of the work. The contractee proceeded to a certain stage of his work when further prosecution was stopped by the refusal of the company to furnish a certain cable needed in the operations, and which it was bound to supply under the agreement. Under a count for damages the contractee proved the amount of his expenditures and the value of his services. These items constitute the correct element of damages under the rule that a party who voluntarily and wrongfully puts an end to a contract and prevents the other party from performing it is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred and for his own services.

Blair v. Brownstone Oil & Refining Co. (Cal. App.), 170 Pacific 160.

RIGHT OF RAILROAD COMPANY TO MINE OIL ON ITS RIGHT OF WAY.

A deed to a railroad company conveyed the fee in the land used by it for its right of way. Under such a conveyance the railroad company can not be enjoined or restrained either from leasing its land for oil development or from itself drilling oil wells and extracting oil therefrom upon its land. The fact that the wells on the railroad company's right of way will drain the oil from adjoining lands is not a sufficient ground for the exercise of the restraining power of a court of equity.

Chrowell v. Howard (Texas Civ. App.), 200 Southwestern 911, p. 912.

TRUST—RIGHTS OF PURCHASER WITH NOTICE.

An oil and gas lease was executed in the name of one of the members of a group of buyers who took title for the benefit of all. The

fact that the prospective purchaser of the lease was informed by one of the beneficiaries that he owned a sixth interest in the lease was sufficient to put the purchaser from the trustee on inquiry and to prevent him from obtaining higher rights than were held by the beneficiaries.

Aaron v. Rothrock (Kansas), 169 Pacific 1161.

JURISDICTION TO ADMINISTER OIL RIGHTS—RECEIVER.

The United States began suit to avoid an allotment and patent, and after answer by the defendants a receiver was appointed upon the request of both parties. The receiver, by order of the court, was directed to continue the production of oil and to make an agreement for the development of the land by which the lessee should deliver or pay to the receiver one-fourth of all oil and gas produced, the lessee to be released from any claim of the parties to the action. The court acquired jurisdiction of the property by taking possession thereof by its receiver and thereby withdrew such property from the jurisdiction of every other court and could retain the control of the property until its judgment was completely effectuated and was free from the interferences of all other tribunals, and a party acquiring interest in the property could not in any other court litigate his claim to the royalties.

Black Panther Oil & Gas Co. v. Swift (Oklahoma), 170 Pacific 238.

NATURAL GAS.

PUBLIC SERVICE COMMISSION—REGULATION OF RATES.

The Public Service Commission of Missouri has no power to suspend the schedules of rates agreed upon by the receiver for interstate pipe lines transporting natural gas from Oklahoma through Kansas into Missouri, and it has no power to establish a new rate for natural gas in a city in the State of Missouri. Such acts constitute an attempt directly to interfere with and directly to burden interstate commerce.

Landon v. Public Utilities Commission, 245 Federal 950, p. 954.

DANGEROUS PREMISES—ATTRACTIVE NUISANCE—INJURY TO CHILD.

The doctrine that it is not the duty of a landowner or occupier to exercise care to make it safe for infant children to come upon it without invitation and merely by sufferance has no application to a case where the landowner or occupier has taken no steps to inform the public of his occupancy; and a pipe-line company that established a pipe line for the transportation of natural gas and which from its

defective condition permitted the gas to escape, and which was attractive and dangerous to young children upon land having the appearance of a public highway and used by the public, including the children of the community, and failed either to give notice that the place was not open to the public or to take the proper precaution to protect the public, including the children, against the danger that has been created is liable to a child injured by reason of such escaping gas.

Jackson v. Texas Co., 143 Louisiana, —, 78 Southern 137, p. 139.

GAS MAIN—NEGLIGENCE IN MAINTAINING—LIABILITY FOR INJURY.

A company laying and maintaining a gas main on the surface of the ground along and over a traveled way, or upon and over a way where persons are invited to travel, and another company conveying its gas through such main at a high and dangerous pressure may both be liable for injuries to a person traveling on such way and injured by reason of the breaking of the gas main due to the high pressure of the gas. The companies under the circumstances of the case may be liable on either the theory of negligence or on the violation of the duty of a landowner for injury to an invitee caused by the dangerous condition of the premises.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 35.

PIPE LINES.

CARE REQUIRED OF OWNER—LIABILITY FOR INJURIES FROM ESCAPING GAS.

There rests upon the owner of a pipe line conveying natural gas through land commonly used as a public highway in an inhabited place the obligation to exercise vigilance commensurate with the danger and of a character to protect the public in person and property from injury and destruction. In an action for an injury to a child caused by escaping gas it was shown that a leak in the pipe line had existed for five months; that the escaping gas could be heard by passers on the highway; that it was often lighted and could be seen at night throughout the neighborhood; that a child, with other children, attracted to the place by the leaking gas and by reason of the gas being lighted by another child was severely burned and injured. The owner of the pipe line did not learn of the leak until after the injury to the child, but the inspection of the line was perfunctory and insufficient and was not likely to have furnished the information until after some injury had been inflicted or some property destroyed. In such case the pipe-line owner is guilty of negligence in failing to make an earlier discovery of the leak and is liable

for the consequences to the same extent as though the discovery had been made and the leak nevertheless been allowed to continue.

Jackson v. Texas Co., 143 Louisiana, 78 Southern 137, p. 138.

APPROPRIATION OF PRIVATE PROPERTY—REGULATION OF RATES.

A pipe-line company organized for the purpose of transporting oil for hire availed itself of the right of eminent domain in demanding private property for its right of way over which it constructed its pipe line on the ground that it was necessary for use in constructing such pipe line through and by means of which it proposed to serve the public. This must be deemed conclusive evidence of the dedication of such property to the public use, and having acquired its right of way by holding itself out as a common carrier and as an agent of the State in charge of a public use, without which it could not have seized property vested in private ownership, it thereby becomes subject to State control and is within the contemplation of the public-utilities act.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 61.

PROPERTY DEVOTED TO PUBLIC USE—STATE CONTROL.

A pipe-line company voluntarily assumed the duty of and embarked upon a business of a public character in transporting oil for hire, and, subject to compliance with its conditions, it carried everybody's oil to market. A corporation or person who devotes his property to a use in which the public has an interest in fact grants to the public an interest in that use and must submit to be controlled by the public for the common good to the extent of the interest thus created. Conceding its right in the absence of an irrevocable dedication to discontinue the conduct of such public business, nevertheless until such discontinuing its tolls, rules, and regulations are subject to the control of the railroad commission.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 61.

Associated Pipe Line Co. v. Railroad Commission (California), 169 Pacific 62, p. 64.

PUBLIC CONTROL—TAKING OF PRIVATE PROPERTY.

A law that deprives a pipe-line company of the beneficial use and free enjoyment of its property or imposes restraint upon such use and enjoyment that materially affects its value without legal process or compensation deprives the company of its property within the meaning of the Constitution. It is not necessary in order to render a statute obnoxious to the restraints of the Constitution that it must

in terms or in fact authorize the actual physical taking of the property, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner. Under these principles the public-utilities act can not authorize the supervision and regulation of rates of a pipe line privately owned and operated.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 65.

REGULATION BY PUBLIC UTILITIES.

Under the public utilities act of California the Railroad Commission is authorized of its own motion or upon the complaint of any person to inquire into any act or thing done by any public utility and to make such order therein as may be necessary to compel any public utility to comply with a law or the orders and rules of the commission. The act does not authorize a proceeding for the sole purpose of inquiring and determining whether a particular person or corporation is carrying on a public utility or is engaged in a private enterprise. The jurisdiction of the commission to make an order regulating a pipe-line company for the transportation of oil dependent upon whether the pipe line was engaged in the business of a common carrier in the transportation of oil, and for the purpose of determining its jurisdiction it was vested with power to determine the facts upon the existence of which it was authorized to make the order.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 61.

MONOPOLY—PUBLIC CONTROL.

The purpose of subdivision (d), Sec. 1 of the California act of 1913, regulating pipe-line companies was to terminate and prevent a monopoly in the oil pipe line business. The fact that a corporation operating a pipe line in transporting oil, a part of which was produced by the company itself, and that it bought crude oil in the fields from independent producers who had no efficient means of shipping their oil to market and contracted to sell their oil to the pipe-line companies at prices agreed upon; that there was no agreement, tacit or otherwise, existing between the pipe-line company and other similar companies as to the price that should be paid in the purchase of oil; that at times the production of oil was largely in excess of the demand therefor and practically no difference was paid by several companies purchasing oil, and convenience and economy in delivery of the oil, both to the purchaser and buyer, could well be deemed a controlling factor in making the purchases, is not sufficient to establish a monopoly created by the pipe-line company interested and is

not sufficient to bring one of the individual pipe lines within the public utilities act and make it subject to the Railroad Commission.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 65.

COMMON CARRIER—REGULATION.

The statute of California provides that every corporation and individual owning or operating any pipe line for the transportation of crude oil or the products thereof, to or for the public, for hire, where such pipe line is constructed or maintained along, over, or under any public highway is a common carrier and subject to the provisions of the public utilities act. The State can not appropriate private property for a public use without just compensation, but when the owner of a pipe line voluntarily devotes it to a public use, or in fact grants to the public an interest in such use, to the extent of the interest so devoted to the public the public may insist on a voice in the control and regulation thereof. This applies to a pipe line used for the transportation of oil for the public and brings it within the jurisdiction of the Railroad Commission.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 61.

Associated Pipe Line Co. v. Railroad Commission (California), 169 Pacific 62, p. 63.

PRIVATE OWNERSHIP AND OPERATION.

A pipe line company that owned and operated oil fields and transported its oil through its own pipe lines, using its property for private use and not devoting its property or pipe line to the use of the public is not subject to control and its rates to regulation by the Railroad Commission under the public utilities act. The fact that it had purchased and transported a comparative small proportion of oil to that produced in its own fields can not constitute it a common carrier or engaged in transporting oil for the public. The fact that "the business is such that the public needs the use in the same, and that the conduct of the same is a matter of consequence," is immaterial on the question of public control and does not change the nature of the private ownership or use.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 65.

CONSTRUCTION OF PIPE LINE—DUTY TO MAINTAIN IN SAFE CONDITION.

An oil and gas company constructing a pipe line across a way used by the public as a highway with the acquiescence of the owner of the land and with the right of the public to use and which right was recognized by the pipe-line company by making provision for preventing the obstruction of the highway by its pipe line, is under the

same obligation to construct and maintain such pipe line in a reasonably safe condition as though the right of way was in fact a public highway.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 33.

NEGLIGENCE IN MAINTAINING—LIABILITY FOR INJURY.

A company operating for oil, having a private road from the place of its operations to the public highway, which agrees to furnish to another for use at another place an appliance owned by it, such appliance to be removed by the party desiring its use, thereby extends an invitation to such other party to come upon its premises for the purpose of removing such appliance therefrom, and if in the removal of such appliance it be necessary to use such private road of the owner, and in the use thereof the party removing such appliance, or his servant, is injured because of the careless and negligent construction of a pipe line across such road by the owner thereof, the injured party may recover damages sustained by reason of such injury from the party so negligently and carelessly maintaining such pipe line.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern, 28, p. 34.

CONCURRENT NEGLIGENCE—LIABILITY.

Where the concurrent negligence of two or more persons combined together resulted in an injury to a third person, he may recover from either or all. In determining the liability of either person so negligent the comparative degrees of negligence are not to be considered. Each is liable for the whole, although the other was capable of contributing in a greater degree to the injury, but the proportion in which the negligence of each contributed to the injury or the degrees of care used is not to be considered. The rule applies to a pipe-line company owning and operating a pipe line, and also to a gas company using the pipe line as a means of conveying its gas.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 35.

LAND DEPARTMENT.

SPECIAL TRIBUNAL—PURPOSE.

The Land Department is a special tribunal created by law for the purpose of determining the conflicting claims arising over the public lands; and a finding of fact by that tribunal upon matters within its jurisdiction is conclusive upon the courts, except for fraud or imposition which prevents the losing party from fully and fairly presenting his case or the officer of that tribunal from properly considering it.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

CLASSIFICATION OF LAND AS MINERAL OR NONMINERAL—CONCLUSIVENESS.

When a classification of public lands as mineral or nonmineral under the act of February 26, 1895 (28 Stats., 683), has been completed, the officers of the Land Department are not authorized or permitted thereafter to examine into the character of the land for which a patent is applied, but by reference to the records it is determined from the classification made whether the particular land was mineral or nonmineral in character.

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

ISSUANCE OF PATENT—ABSENCE OF FRAUD—FINDING CONCLUSIVE.

In an action by the United States to cancel and vacate patents to public lands when the question of fraud is eliminated then the finding of the land officers of the Government that the lands were not coal lands is conclusive upon that question.

United States v. Porter Fuel Co., 247 Federal 769, p. 774.

ISSUANCE OF PATENT—PRESUMPTION AND CONCLUSIVENESS.

The execution and record of a patent are the final acts of the officers of the Government for the transfer of its title and as these can be performed only after certain steps have been taken, the patent duly signed, countersigned and sealed, not merely operates to pass the title but is in the nature of an official declaration by that branch of the Government to which the alienation of the public lands is entrusted that all the requirements preliminary to its issuance have been complied with. The presumptions thus attending a patent are not open to rebuttal in an action at law; and it is this unassailable character which gives to the patent its chief and, in fact, its only value as a means of quieting its possessor in the enjoyment of the lands it embraces.

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

PUBLIC LANDS.

CLASSIFICATION—EFFECT.

A classification of public lands as mineral or nonmineral under the act of Congress of February 26, 1895 (28 Stats., 683), sets at rest for all time the question of the mineral or nonmineral character of the land.

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

PATENT PASSES TITLE.

Where the Land Department has jurisdiction the legal title passes when patent issues for any part of the public land.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

RAILROAD GRANTS.

CLASSIFICATION—GRANT OF LANDS.

It is expressly provided in the act of February 26, 1895 (28 Stats., 683), that no patent or grant shall be made to the Northern Pacific Railway Company for any land in the land districts until such land shall have been examined and classified as nonmineral. Accordingly where an allegation is made that a patent has been issued to the Northern Pacific Railroad Company, the presumption is that the issuance of the patent is in the nature of a judicial determination that every fact has been found which was necessary to entitle the patentee to the legal title to the land and is tantamount to an allegation that the land conveyed was duly classified as nonmineral, and that such classification was approved before any valid mineral locations were made upon the land.

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

MINING CLAIMS LOCATED ON RAILROAD GRANT.

Pursuant to the act of Congress of February 26, 1895 (28 Stats., 683), certain lands in Montana within the limits of the grant to the Northern Pacific Railway Company were duly classified as nonmineral and in 1907 a patent was issued to the railroad company for such lands. In 1905 and 1906 certain lode-mining claims were located upon portions of the land classified as nonmineral under the act of February 26, 1895, and were subsequently patented to the railroad company. Neither the locator of these claims nor his assignee can hold the same as against a subsequent grantee of the railroad company, notwithstanding the fact that the evidence shows that the particular lands are mineral in character, known to be such for 40 years or more, and that as early as 1893 a patent was issued for a certain quartz lode-mining claim located upon portions of the land in controversy, as the classification as nonmineral and the subsequent issuances of the patent to the railroad company are conclusive of the nonmineral character of the land.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

EMINENT DOMAIN.

POWER TO EXERCISE—PUBLIC UTILITIES.

Under the public utilities act of California, the Railroad Commission is an instrumentality of the State, and is authorized to supervise and regulate every public utility in the State, with power to fix tolls and charges against and for the services performed, but the Railroad Commission has no power to declare what will constitute a public utility and the legislature itself possesses no such power. It can not by edict make that a public utility which in fact is not and take private property for public use by its fiat that the property is being devoted to a public use. It can not declare that every corporation owning a pipe line through and by means of which it transports oil is a common carrier and subject to the provisions of the public utilities act. The legislature has no power to declare any pipe line to be a common carrier unless in fact it is such. A pipe-line company transporting the oil produced by it in its own field, and not engaged in the business of transporting for hire, can not by a mere declaration of a statutory enactment be made a common carrier subject to the provisions of the public utilities act. Such a provision would constitute a taking of private property by the State for public use without due process of law.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 66.

REGULATION OF PIPE LINES.

The Constitution of California (sec. 23, Art. XII) provides that every private corporation operating any pipe line within the State for the transportation of crude oil, either directly or indirectly, to or for the public and every common carrier is declared to be a public utility subject to such control and regulation by the Railroad Commission as may be provided by the legislature. But under this provision the State can not subject private property to a public use, nor confer authority on the Railroad Commission to assume control of private pipe lines engaged in the transportation of crude oil. Neither by the declaration of the State Constitution nor by the act of the legislature can private property be taken for public use without just compensation.

Producers' Transportation Co. v. Railroad Commission (California), 169 Pacific 59, p. 60.

Associated Pipe Line Co. v. Railroad Commission (California), 169 Pacific 62, p. 63.

MINING TERMS.

JACK SETTER.

A jack setter is a miner assisting in the operation of a coal-cutting machine, one of whose duties is to see that the roof of the mine at or near where the cutting machine is at work is in a reasonably safe condition.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072.

MINERALS.

The term "minerals" when employed in a conveyance in the State of West Virginia is understood to include every inorganic substance which can be extracted from the earth for profit, whether it be solid, as rock, fire clay, the various metals, and coal, or liquid, such as salt and other mineral waters and petroleum oil and gas.

Horse Creek Land & Mining Co. v. Midkiff (West Virginia), 95 Southeastern 26, p. 27.

"MISFIRE" HOLE.

Where for any cause a charge has failed to explode, the drill hole containing such charge is spoken of as a misfire hole.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147.

SEAM BLAST.

Seam blast is a blast made by placing powder or other explosives along and in a seam or crack between the solid wall and the stone or coal intended to be removed, made or opened by reason of the original shot or blast that was not heavy enough to throw or remove the stone or coal from the solid mass.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

SKIPS.

Skips are cars operated from the surface by cables used for hauling ore or for taking miners into and out of the mine.

Moreno v. New Guadalupe Mining Co. (Cal. App.), 170 Pacific 1088.

"SNOW BIRD" MINES OR SHIPPERS.

"Snow bird" mines or shippers is a term applied by railroad managers to team track loading mines that produce only small quantities

of coal and can not operate under normal conditions, but only when coal is high by reason of a scarcity or a shortage of cars for shipment.

Baltimore & Ohio Railroad Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

TOOL NIPPER.

Tool nipper is a term applied to a person whose duty it is to carry powder and sharpen drills and tools used in a mine down to the various levels of the mine and to bring such tools and drills as have been dulled by use to the surface.

Moreno v. New Guadalupe Mining Co. (Cal. App.), 170 Pacific 1088.

MINING CORPORATIONS.

AUTHORITY OF PRESIDENT—SIGNING NOTES—RATIFICATION.

The president of a mining corporation borrowed money and signed notes representing the amount as president of the mining company. The lender requested the board of directors to pay the note. The answer, without any written entry, was that when the mine gets on a productive basis we will try and take care of it and will keep it in mind, so when we get on a productive basis we can look after you if we so choose. This in no sense amounted to a ratification of the act of the former president, nor did it amount to the making of a new contract.

Massie v. Eldorado Gold Star Mining Co. (Cal. App.), 171 Pacific 814, p. 815.

DUTY TO KEEP OFFICE AND BOOKS WITHIN THE STATE.

The statute of California makes it the duty of the secretary of every corporation formed for the purpose of mining or corporations conducting mining operations in California to keep an office within the State and a complete set of books and to publish monthly an itemized statement or balance sheet. This includes mining corporations organized in the State of California for the purpose of conducting mining operations in other States, and such a corporation must keep an office and a complete set of books in the State of California.

Overton v. Noyes (California), 170 Pacific 1110.

ISSUANCE OF STOCK WITHOUT CONSIDERATION.

The issuance of capital stock of a mining corporation without consideration and without payment therefor is a violation of the Constitution (Art. XII, sec. 11) and of the Civil Code (sec. 359), and directors in so doing commit a breach of trust that may be redressed in an action by the stockholders for the benefit of the corporation.

James v. P. B. Steifer Mining Co. (Cal. App.), 171 Pacific 116, p. 119.

LIABILITY OF TRUSTEE FOR ASSESSMENTS.

A person holding stock of a mining corporation as trustee is liable for calls on the subscription contract made as assessments.

La Habra Oil Co. v. Francis (Cal. App.), 169 Pacific 401.

LIABILITY OF STOCKHOLDER—JOINT ACTION BY CREDITORS.

The constitution of South Dakota makes the stockholders of a corporation personally liable for the debts of the corporation to the extent of the amount remaining unpaid upon stock owned by any stockholder. The statute also provides that any creditor of the corporation may institute joint or several actions against any of the stockholders that have not fully paid for the capital stock held by him. But this personal liability of stockholders can not be enforced in a Federal court by a bill in equity against several stockholders jointly, as the South Dakota statute can not enlarge the Federal jurisdiction in equity, and that jurisdiction does not extend to such actions.

Clinton Mining & Mineral Co. v. Cochran, 247 Federal 449, p. 451.

GUARANTORS OF STOCK—LIABILITY.

The promoters of a mining corporation executed an agreement reciting the fact that they were promoting the organization of a corporation for the purpose of mining gold, and agreed when the corporation was organized to deliver to a certain named person a certain amount of the shares of the capital stock for a specified sum. The instrument also covenanted to save the subscriber harmless thereon and to secure the subscriber for his investment, and guaranteed the repayment of the money with interest at 6 per cent per annum, the principal sum to be repaid in three years from the date of the agreement. The capital stock became worthless, the company eventually failed, and the corporation was dissolved. The guaranteed subscriber could have sued the guarantors at law for reimbursement of the amounts paid by him with interest, but he can not maintain a bill in equity to compel specific performance of so much of the agreement as relates to the exercise of a power mentioned or described in the contract of guaranty. If the power promised to be exercised by the agreement had not been exercised pursuant thereto, the only remedy of the guaranteed subscriber would have been an action for damages against the estate of the guarantor.

Vinton v. Pratt (Massachusetts), 117 Northeastern 919, p. 920.

LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS—PARTIES.

The statute of South Dakota (sec. 441, Civil Code), makes stockholders of a corporation personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by any stockholder, and gives any creditor the right to institute actions against one or more stockholders to recover any such unpaid balance. Such an action can be maintained by a creditor against one or more stockholders of a mining corporation to recover an un-

paid balance due on stock subscription without the corporation itself being made a party to the proceedings.

Clinton Mining & Mineral Co. v. Cochran, 247 Federal 449, p. 451.

LIABILITY OF STOCKHOLDER—CONCLUSIVENESS OF JUDGMENT AGAINST CORPORATION.

In an action by a creditor against stockholders of a mining corporation to enforce their statutory liability, the stockholders are concluded on the question of corporate indebtedness by a judgment against the corporation in the absence of fraud.

Greenfield v. Minnesota Mining & Developing Co. (Minnesota), 165 Northwestern 274.

SALE OF STOCK—FRAUD NOT ESTABLISHED.

By representations that a mining corporation owned mining properties in Mexico that were exceedingly rich and valuable, a person was induced to purchase stock in the mining corporation and executed his notes therefor. Such representations are not sufficient alone to constitute fraud where the mining company did own mines in Mexico, had employed from 15 to 125 men and had in its employ and in actual work at the mine engineers, assistant engineers, and superintendents who were receiving substantial salaries, and it had constructed buildings, installed machinery, had done considerable work in developing the mines, and had spent in the mining operations something like \$60,000 aside from the construction of a road, and many tons of ore has been actually mined ready for transportation, the ore being of a nature to produce minerals in paying quantities, and where, according to the testimony of competent persons, it appeared that the mineral-producing rock that had been actually removed from the place was of the value of several million dollars.

Leslie v. Ebner (Ind. App.), 118 Northeastern 829, p. 830.

RIGHT OF STOCKHOLDER TO SUE ON BEHALF OF CORPORATION.

The fraudulent appropriation of the funds and the spoliation and destruction of the property of a corporation through the agencies of the directors presents an obvious instance for the interposition of equity at the suit of the stockholders who sustain a fiduciary relation to the corporation and whose interests they really represent in the action. Courts of equity may enjoin on the behalf of the stockholders of a corporation any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises as well as the improper management of the

business of the company or a wrongful diversion of its funds. A court of equity as far as it can be done will compel the restitution and restoration of the funds or property of a corporation that have been misappropriated or destroyed by the directors.

James v. P. B. Steifer Mining Co. (Cal. App.), 171 Pacific 116, p. 117.

SUIT BY STOCKHOLDERS—DEMAND ON DIRECTORS EXCUSED.

Stockholders of a mining corporation may maintain a suit against directors guilty of fraudulent conduct without making a demand upon the directors to sue when it appears that it would be futile and useless to make the demand on the corporation or its directors and officers to commence a suit to obtain relief. So a demand is excused where the directors are parties to the suit and claim the right to do what they are charged with having done.

James v. P. B. Steifer Mining Co. (Cal. App.), 171 Pacific 116, p. 120.

JUDGMENT AGAINST CORPORATION—FRAUD IN OBTAINING—PLEADING.

In an action by a creditor of a mining corporation against the stockholders to enforce their liability where a judgment had been rendered against the corporation, a stockholder may defend on the ground of fraud on the part of the plaintiff in procuring the judgment or the cause of action on which the judgment was based. General allegations of fraud in that the plaintiff was the vice president and principal stockholder of the mining corporation and advanced large sums of money, taking its notes at usurious rates and compelling it to turn over large amounts of stock as a consideration for the loan, and averring also that the judgment upon such loan was suffered to be entered by default or through the fraud and collusion of the directors and officers of the corporation with the plaintiff are insufficient as a basis for relief. Mere general allegations of fraud are insufficient and the facts constituting the usury are not specifically stated and the answer is insufficient to present an issue of fraud.

Greenfield v. Minnesota Mining & Development Co. (Minnesota), 165 Northwestern 274, p. 275.

FOREIGN CORPORATION—APPOINTMENT OF PROCESS AGENT.

The statute of Nevada requires every foreign corporation to appoint and keep a State agent upon whom all legal processes may be served and provides that if any such company shall fail to appoint such agent it shall be lawful to serve such company with any and all legal processes by delivering a copy to the secretary of state. These sections fail to provide a means whereby proper notice should be

given to a foreign corporation and do not constitute due process of law.

Wildes v. Lou Dillon Gold Field Mining Co. (Nevada), 170 Pacific 1046.

FOREIGN CORPORATION—AFFIDAVIT FOR PUBLICATION.

The statute of Nevada provides for service on foreign corporations by publication on the filing by the plaintiff of an affidavit showing the defendant to be a nonresident of the State. If the residence of a nonresident is known the court shall also direct a copy of the summons and complaint to be deposited in the postoffice directed to the person or corporation to be served at his place of residence. Nothing less than a strict compliance with the State providing for constructive service will confer jurisdiction. The statute requires that where the residence of a nonresident defendant is known it must be stated and if the residence of a nonresident is unknown to the person making the affidavit, a statement to that effect must be made. It is in the probative facts stated in the affidavit that the order of the court directing service by publication must find justification, and from these, the court must find grounds upon which to conclude that the ultimate facts required by the statute exist.

Wildes v. Lou Dillon Gold Field Mining Co. (Nevada), 170 Pacific 1046, p. 1047.

DISSOLUTION ON VOTE OF STOCKHOLDERS—RIGHT TO DEMAND CERTIFICATE.

The stockholders of the Old Dominion Mining & Smelting Company resolved to terminate its corporate existence by a voluntary dissolution and prior to March 24, 1917, filed with the secretary of state of New Jersey the written consent of the stockholders in accordance with the requirements of the statute and requested that officer to issue to it the formal certificate of its dissolution. The secretary refused to issue the certificate because as claimed by him and as certified by the Comptroller the taxes for the year 1917 were an existing obligation against the corporation and it could not be dissolved without the payment of all existing taxes. Under the statutes of New Jersey providing for the taxation of corporations the yearly period begins on April 18 of each year, and at the time of the filing of the written consent of the stockholders to the dissolution of the corporation the time for assessing and levying the taxes for the year 1917 had not been reached and such taxes were not then an existing lien against the corporation, and the comptroller should have certified to the secretary of state that all taxes levied or assessed against the Old Dominion Mining & Smelting Company had been paid and the secretary of state should have issued the dissolution certificate as requested.

Old Dominion Copper Mining & Smelting Co. v. State Board of Taxes & Assessments (New Jersey), 103 Atlantic 79, p. 80.

DOUBLE TAXATION.

A construction of the statute which would authorize a double taxation of mining corporations is not to be adopted unless it is required by the express terms of the statute or by necessary implication.

Old Dominion Copper Mining & Smelting Co. v. State Board of Taxes and Assessment (New Jersey), 103 Atlantic 79, p. 81.

EXEMPTION FROM ANNUAL LICENSE FEE.

Mining and other corporations are required by the statute of New Jersey (act 1884, P. L. p. 232), to pay an annual tax for the use of the State by way of a license for their corporate franchises. By the same act corporations are required to pay a yearly license fee or tax of one-tenth of 1 per cent on the amount of the capital stock; but mining companies and certain other named companies are expressly excepted from the latter provision.

Old Dominion Copper Mining & Smelting Co. v. State Board of Taxes and Assessment (New Jersey), 103 Atlantic 79, p. 80.

LIABILITY AS ASSIGNEE OF COAL LEASE—ESTOPPEL.

A mining corporation, being a large stockholder in another mining company in order to protect its interests as such stockholder undertook to operate a coal mine and to mine the coal under a lease assigned to the company in which it owned the stock, is estopped from accepting the benefit of the lease and rejecting its burden, and is liable for the payment of the royalties stipulated in the lease.

Bruce Coal Co. v. Bibby (Alabama), 77 Southern 545, p. 547.

USE OF PROPERTY—OPERATION OF OIL WELL.

A railroad company owning the fee of the land used by it as a right of way is not to be enjoined from drilling and operating an oil well on such land, because the statute provides that no corporation shall employ or use its property directly or indirectly for any other purpose whatever than to accomplish the legitimate purpose of its creation or those permitted by law to be applicable.

Chrowell v. Howard (Texas Civil App.), 200 Southwestern 911, p. 912.

KNOWLEDGE OF RULES OF FIRST-CLASS MINING.

A mining corporation organized under the laws of the State of Kansas and carrying on coal-mining operations in that State, leased a tract of land in Missouri adjoining the Kansas State line, and by the terms of the lease bound itself to mine all the minable coal in the

land that could be mined under the rules of first-class mining prevailing in the southern Kansas coal district. In construing the lease a court will presume that the mining company was well acquainted with the nature and conditions of the work it was engaged to perform, the mineral character of the lands upon which it was to be performed, and the rules of first-class mining in the coal district named. Where the nature or substance of these rules is not given a court will presume that they mean good, safe mining with respect to the conservation of the product, the protection of the miners, and the prevention of injury to the surface, as all of these would be implied.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 234.

TRANSPORTING GAS THROUGH DANGEROUS PIPE—LIABILITY.

A mining company transporting its gas at a high pressure through gas pipes maintained on the surface of the ground and laid along or across a traveled way, may be liable for injuries caused by the breaking of the pipe due to the high pressure of the gas, although the gas pipe was owned and laid by a different corporation.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 34.

MAINTAINING A DANGEROUS GAS MAIN—LIABILITY FOR INJURIES.

A mining corporation laying and maintaining a gas main on the surface of the ground and on and along or across a traveled way may be liable to a person injured by a breaking of the gas main due to the high pressure of the gas, though the gas in the main was owned and transported and used by another and different company.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 34.

MINING PARTNERSHIPS.

CREATION AND EXISTENCE.

Under the statute of California (Civil Code, sec. 2511), a mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom and actually engage in working the same, but it is not necessary to the existence of a mining partnership that the property which is to be operated be owned in fee by the partners.

Harper v. Sloane (California), 169 Pacific 1043, p. 1045.

ACTUAL WORKING OF MINE NOT NECESSARY.

It is not essential to a mining partnership that each of the partners shall perform physical work upon the claim. One partner who supplies money to be used in working the mine is engaged in such work as truly as the one who devotes his own labor to the enterprise.

Harper v. Sloane (California), 169 Pacific 1043, p. 1046.

PARTNERSHIP IN PROPERTY TO BE HELD BY EQUITABLE TITLE.

A mining partnership may be created and exist with reference to mining property held by an equitable title as such ownership is a sufficient basis for the existence of a partnership.

Harper v. Sloane (California), 169 Pacific 1043, p. 1046.

RIGHT TO ACCOUNTING.

Where a mining partnership exists under which one of the partners expended money and labor, he is entitled to an accounting in order to settle the relative rights of himself and his copartner. The rule applies although the partnership had been dissolved or abandoned before the commencement of the action for an accounting.

Harper v. Sloane (California), 169 Pacific 1043, p. 1046.

MINING CLAIMS.

MINERAL CHARACTER OF LAND.

FINDING OF LAND DEPARTMENT NOT CONCLUSIVE.

The finding by the officers of the Land Department respecting the mineral character of a tract of land embraced within a mineral entry is not itself final or conclusive but essentially interlocutory. It is only a step in the proceedings looking to the ultimate disposal of the title, and until the issuance of a patent is as much open to reconsideration and reversal as are the interlocutory orders or decrees of a court of equity until the entry of the final decree. The Land Department is authorized at any time before patent to inquire whether the original entry was in conformity with the law.

Kirk v. Olson, 38 Supreme Ct. Rep. 114, p. 115.

PATENT AS AN ADJUDICATION.

A patent duly issued by the Land Department sets at rest for all time the question of the mineral or nonmineral character of the land described.

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

LOCATION OF CLAIM.

LOCATION ON RAILROAD LANDS—PRIORITY OF RIGHT.

A valid location of a mining claim can not be made upon lands within the limits of the grant to the Northern Pacific Railway Company upon lands that had been classified as nonmineral pursuant to the act of February 26, 1895 (28 Stats. 683).

Thomas v. Horst (Montana), 169 Pacific 731, p. 733.

ASSESSMENT WORK.

DETERMINATION OF VALUE.

The true test for determining the value of assessment work upon a mining claim is the actual value of the improvements to the mine and not the amount of wages paid to workmen performing the work or the amount and cost of material used. Evidence of the cost of labor and material used is competent as tending to show the good faith of the owner making the expenditures; but it is not conclusive upon the value of such improvements.

McKirahan v. Gold King Mining Co. (South Dakota), 165 Northwestern 542, p. 543.

WORK ON ONE CLAIM—EFFECT ON OTHERS.

It does not follow as a matter of law that the assessment work performed on any one mining claim must be equally apportioned to all adjoining claims owned by the same locator or owner. A person owning a number of adjoining claims can do \$100 worth of work on any one claim and hold it and forfeit all the others; or he might do enough work on one claim to hold two claims and forfeit the others, and he might designate the particular claims he intended to hold. In such case the assessment work would hold the claim upon which it was done or any other claims for which it was done, where the particular claim is designated.

McKirahan v. Gold King Mining Co. (South Dakota), 165 Northwestern 542, p. 543.

RESUMPTION OF WORK PREVENTS RELOCATION.

A mining claim is not subject to relocation by a third person on the ground of the failure of the locator to perform the assessment work within the year where the owner had workmen upon the ground performing labor upon the claim before and at the time of the attempted relocation.

McKirahan v. Gold King Mining Co. (South Dakota), 165 Northwestern 542, p. 543.

DEVELOPMENT SHAFT—INSUFFICIENT PROOF—NEW TRIAL.

In a contest between the original locator of a mining claim and a relocater where the only question was as to the sufficiency of the development work and the validity of the relocation, the relocater is not entitled to a new trial on the ground of newly discovered evidence, where such newly discovered evidence consisted merely in measuring the diameter and depth of the development shaft after the trial and the discovery that it was not of the dimensions required by law, where no good or sufficient reason was shown for not making the measurements before the trial.

McKirahan v. Gold King Mining Co. (South Dakota), 165 Northwestern 542, p. 544.

RELOCATION.

PERFORMANCE OF ASSESSMENT WORK—RESUMPTION OF WORK.

A mining claim is not subject to relocation where the owner either had performed the annual assessment work during the year, or where having failed to perform the assessment work during the year the work had been resumed and was in process of performance at the time of the attempted relocation.

McKirahan v. Gold King Mining Co. (South Dakota), 165 Northwestern 542, p. 543.

PATENTS.

PRESUMPTIONS ARISING FROM PATENT.

The respect due to a patent for public lands, the presumption that all preceding steps required by law were duly observed and the conditions necessary for stability in titles resting upon these instruments, require that in suits to annul patents the Government shall bear the burden of proof and shall sustain it by that class of evidence which commands respect and that amount of it which produces conviction.

United States v. Porter Fuel Co., 247 Federal 769, p. 773.

HOLDER AS TRUSTEE.

Where a patent was issued to one person when in equity and good conscience and under the laws of Congress it should have been issued to another person a court of equity will convert the holder of the legal title into a trustee for the use and benefit of the owner.

Thomas v. Horst (Montana), 169 Pacific 731, p. 732.

AVOIDANCE—SUBSEQUENT DISCOVERY OF MINERALS.

If the applicant's proofs were not false at the time they were presented, they can not be condemned and the good faith of the applicant impuned by any subsequent change in the conditions. There are vast tracts of public land in which minerals of different kinds are found but not in such quantity as to justify expenditure in the effort to extract them, and it is not to such land that the term "mineral" in the sense of the statute is applicable. It is possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the Government may be found in later years to contain valuable minerals, and this has often happened. If the entryman at the time of the patent proceedings, which resulted in the final entry of the land, did not know or had no good reason to know that the lands in question apparently contained no valuable coal deposits, the patents can not be annulled on the ground of fraud.

United States v. Porter Fuel Co., 247 Federal 769, p. 771.

PLACER CLAIMS.

MINERAL CHARACTER—RIGHT OF CLAIMANTS TO RECONSIDERATION.

In an application for patent by a placer claimant the claimant is entitled to notice of the intended reconsideration of the part of the officers of the Land Department of the mineral character of the tract of land and to have an opportunity to support the original finding by evidence and otherwise. He is entitled to show that the tract

was valuable for placer mining as originally found by the land officers. But the irregularity in failing to give notice of an intention to reconsider the question of the character of the land was not prejudicial where the evidence established the fact that the land was strictly agricultural and not subject to entry or acquisition under the placer mining law.

Kirk v. Olson, 38 Supreme Ct. Rep. 114, p. 115.

ADVERSE CLAIM.

RIGHT OF PARTY TO ADVERSE—PLEADING.

On an application for a patent for a mining claim by an alleged owner, a third person filed an adverse claim and thereupon instituted an action to enforce the same. The complaint in the action averred that the complainant at one time was the owner of the mining claim, or had some interest therein, but averred that prior to the institution of the suit he had conveyed all such rights to a certain corporation in consideration of the execution to him of certain shares of its capital stock now owned by him. The pleading by its averments shows that the complainant had conveyed his interest or title in the mine to a corporation but failed to aver or show any right why he as an individual should file an adverse claim and bring action thereon for and on behalf of the corporation. The complaint for these reasons failed to state a cause of action.

Wesseler v. Brankman (Colorado), 170 Pacific 189.

SALE AND TRANSFER.

AGREEMENT TO DEVELOP—CONSIDERATION FOR CONVEYANCE—PAROL PROOF OF INTENTION.

The owner of mineral lands and a mining claim by deed duly executed and in ordinary form conveyed the same to his nephew. At the time of the conveyance the grantor and grantee entered into a written agreement by which the grantee undertook the opening up and developing of the property as a mining claim at his own expense. The agreement contained a clause to the effect that the intention of the parties was to give the full and entire benefit of the property to the grantee, with the right to proceed with the opening up and development thereof and to obtain the full benefit to be derived therefrom except that the grantor was to have care and maintenance during his lifetime. The deed was in no wise ambiguous or equivocal, but its language was clear and plain and its meaning was a matter of pure legal interpretation. The declaration of intention incorporated into the agreement constituted a "term" of the contract under the terms of the deed and the express declaration of the agree-

ment itself. Parol evidence was not admissible to show the intention of the grantor and to prove that the conveyance was made on a condition subsequent.

White v. Hendley (Cal. App.), 169 Pacific 710, p. 713.

AGREEMENT TO TRANSFER—EFFECT ON TITLE.

A written agreement between the owner of an undivided interest in a mining claim and a prospective purchaser by which the owner agreed to transfer his interest to the purchaser on the payment of a stated sum, does not of itself deprive the owner of his interest in the claim.

Mohr v. North Rawhide Development & Mining Co. (California), 170 Pacific 600.

STATUTES RELATING TO MINING OPERATIONS.

CONSTRUCTION, VALIDITY, AND EFFECT.

APPLICATION TO MINE OPERATOR.

Subsection (c) of section 29 of the Illinois mining act, (Hurd Rev. Stats., 1915-16, ch. 93), applies only to a mine operator who is an employer. Some of the provisions of the act apply to miners, others to the operator or owner of the land, or some may be applicable to all persons, but subsection (c) of section 29 applies only to the operator, and under this subsection a mine foreman can not be joined as a co-defendant with the mine operator and held liable for damages for injuries to a miner caused by an explosion of powder at the face of the coal where the miner was working.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

REGULATIONS FOR TRANSPORTATION OF COAL.

The Public Service Commission of West Virginia permits just discrimination in the matter of furnishing cars for the transportation of coal, but the Public Service Commission is authorized to change only unjust, unreasonable, insufficient and unjustly discriminatory "regulations, measurements, practices, acts, or service." The amendatory act (Code 1916, ch. 150), does not clothe the commission with unlimited power over the subject of classification.

Baltimore' & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

DUTIES IMPOSED ON OPERATOR.

DUTY TO FURNISH PROPS.

The statute of Arkansas (sec. 5352, Kirby's Digest) requires the owner, agent, or operator of any mine to keep a sufficient amount of timber to be used when required as props so that miners can properly secure their working places in the mine. Where the failure to furnish props had nothing to do with the injury and the result would have been the same if props had been furnished the mine operator may not be held liable.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 922.

DUTY OF PROPPING.

As a miner in his mining operations passes on in his work and the mine operator assumes to occupy the room with tracks, cars, and

mules, the duty to support the roof back of the working place rests upon the mine operator. It is then no longer the working place of the miner in the sense that these terms are used in the Iowa statute. Although the roof may be properly secured at the time the work is in progress it may become defective and unsafe and the props that made it safe for the miner may no longer make it safe for those who use or traverse the room, therefore it is made the duty of the mine operator, through his foreman or pit boss, to inspect the roof and see that it is kept in a reasonably safe condition.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

DUTY TO WARN OR INSTRUCT.

The statute of Illinois (Hurd Rev. Stats. 1915-16, ch. 93, sec. 20, clause (a), paragraph 14) requires a mine operator to instruct an employee as to the proper method of handling explosives and a mine operator is not relieved of this statutory duty simply on the ground that the Board of Mine Examiners has granted a certificate of competency and qualification to a person to be employed as a miner.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 436.

INSPECTION—DUTY OF MINE FOREMAN.

The statute of Iowa (workmen's compensation act, sec. 2489-13a, supp. Code 1913) makes it the duty of a mine foreman or pit boss in charge of any mine to make careful inspection of the mine from day to day. In an action by an injured miner for damages caused by a fall of slate from the roof of an entry it is proper to show that the roof of the entry at places other than where the miner worked were loose and drummy and that the mine forman was negligent in not making the required inspection, and for which negligence the mine operator must respond in damages.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 394.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

DUTY TO CONSTRUCT TRAVELING WAY AROUND SHAFT—CROSSING BOTTOM OF SHAFT.

The statute of Iowa (sec. 2486j, Code Supp. 1913) requires that mine owners and operators shall construct at the bottom of each hoisting shaft a safe and convenient traveling way around the shaft for employees and animals; and the statute makes it unlawful for any person to pass across the shaft bottom in any other manner than by the traveling way contemplated. The statute excepts such em-

ployees as may be necessary to perform the work at the bottom of the shaft or those engaged in making repairs. The bottom intended within the meaning of this exception is that lowest down beneath the cage; and the exception can not apply to a miner or an employee who is neither engaged in making repairs nor employed to perform work at the bottom of the shaft. A miner employed and stationed in an entry near the bottom of the shaft to direct the loading and unloading of cars and to detach the trips from a cable is not within the class excepted from the operation of the statute. The design of the lawmakers was to prevent injuries from the operation of the cages in the shafts and this is sought to be accomplished by providing a way around the bottom of the shaft; and as such other way was thereby provided, persons are prohibited from crossing the shaft at the bottom. The particular danger to be obviated is that from a descending cage as its descent can not be well known until near and therefore the only safety is in not exposing a person beneath it.

Dennis v. Gibson (Iowa), 165 Northwestern 1030, p. 1032.

WILLFUL VIOLATION—MEANING—QUESTION OF FACT.

The courts, in order to give effect to the purpose of the Illinois mining statute (Hurd Rev. Stats., 1915-16, ch. 93), have given the word "willful" a meaning of a merely conscious failure to do some act without any wrongful or evil intent. The question whether a place is dangerous and ought to be marked is to be submitted to a jury and the judgment of the mine manager on that question goes for naught.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 438.

VIOLATION BY OPERATOR.

WANT OF KNOWLEDGE—BURDEN OF PROOF.

The employer's liability act of Indiana places the burden upon the mine operator of proving that he did not know of a defect in the working place, tool, implement, or appliance, or that he was not chargeable with knowledge thereof in time to have repaired the same or to have discontinued the use of such working place, tool, implement, or appliance. But the statute expressly provides that such proof of want of knowledge may be made under the general denial.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 924.

FAILURE TO INSPECT MINER'S WORKING PLACE.

Under the mining act of Oklahoma (Rev. Laws 1910, sec. 3988), the mine foreman is required to inspect the working places of the miners, and the failure of the foreman to inspect a miner's working

place for unexploded charges of dynamite and the negligence of the foreman in directing and permitting a miner to work near an unexploded charge of dynamite, thereby exploding the charge and injuring the miner, must be regarded as the proximate cause of the miner's injury.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 50.

PLEADING—INSUFFICIENT CHARGE OF VIOLATION—USE OF SAFETY LAMP.

A complaint in an action by an administrator for the death of a coal miner under the statute of Alabama (act 1911, p. 518, sec. 50), where it charges only that the defendant intrusted a safety lamp to the intestate knowing that he was inexperienced or incompetent is insufficient. Under the statute providing that such a lamp shall not be intrusted to any person "until he has given satisfactory evidence to the mine foreman that he understands the proper use thereof and danger of tampering with the same," the fact that the intestate was not experienced and that the foreman knew that he was not, but intrusted him with the lamp, does not necessarily violate the statute. He may have been inexperienced and yet may have furnished satisfactory evidence to the mine foreman that he understood the use of the same. The mine foreman may have undertaken to instruct him and the intestate may have demonstrated that he had learned and understood the use of the lamp, although he had had no previous experience in handling one. If such a lamp could only be intrusted to those of experience, then no new man could be given one or trained or taught to use such a lamp. This section of the statute means that the foreman must ascertain before giving a person such a lamp that he understands the use of the same, whether from past experience or by demonstration and answers after the same is fully explained to him.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 550.

COMPETENCY OF MINER TO USE SAFETY LAMP—PROOF.

The statute of Alabama (acts 1911, p. 518) provides that safety lamps shall not be intrusted to a person until he has given satisfactory evidence to the mine foreman that he understands the proper use of such lamp. In an action for the death of a miner caused by an explosion of gas while using a safety lamp, it is not sufficient and not proper to prove that the intestate understood the proper use of the lamp by a witness stating that he was satisfied from the examination that the intestate knew how to use a safety lamp. This is but the bare conclusion of a witness and does not determine the existence or nonexistence of a material fact in the case. The statute provides

that satisfactory evidence must be furnished the mine foreman, but does not make him the sole arbiter of the fact, but it means such evidence as would reasonably satisfy an ordinarily prudent and careful foreman that the miner understood the proper use of such a lamp, and as to whether or not the evidence was sufficient to satisfy a foreman is a question for the jury.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

NEGLIGENCE PER SE.

Where a mine operator fails to heed a legislative demand to which he is bound to conform he is negligent per se, and if a miner is injured as a result of such failure, however apparent, the latter's right to a recovery shall not be denied as a matter of law solely through a plea that the miner assumed the risk of injury or was negligent in continuing the employment.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 923.

WILLFUL FAILURE TO PERFORM DUTY—LIABILITY.

Subsection (a) of section 29 of the Illinois mining act (Hurd Rev. Stats. 1915-16, ch. 93), makes the wilful failure to do the things required by the act a misdemeanor, which is a violation of public law and an offense against the public. Every person required to do any act is included and the penalty for the misdemeanor is intended to secure the public right. A mine manager or foreman, as well as an employer, may be guilty of a misdemeanor in the violation of this statute and punished accordingly. Subsection (c) under which civil cases are brought does not declare that a cause of action shall arise against any person or persons required to do any of the things enjoined by the act to be done, but simply declares that a right of action shall accrue to any person whose injury is occasioned by the wilful violation of the act or wilful failure to comply with any of its provisions. It is simply declaratory of a right to a civil action and the change in the language is warrant for saying that the general assembly did not intend any such unjust result as a recovery against a mine manager by virtue of this subsection. An employer engaged in the business of mining coal may justly be held liable in a civil action for a failure of duty. He can insure against liability, count such insurance as an expense of his business, and regulate his business accordingly; but to say that an employee working for wages would have to imperil the earnings of a life time, on account of an error of judgment, would be manifestly unjust. The statute was not intended to create a civil liability against a mine manager or mine foreman for a violation of any of its provisions.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 438.

SAFE WORKING PLACE.**DUTY OF OPERATOR—NOTICE OF DANGEROUS CONDITION IN THE ROOF.**

In an action under the Iowa workmen's compensation act by a miner for damages for injuries received by a fall of slate from the roof of an entry, it is proper to prove that the roof of the entry at other places than where the miner worked was loose and drummy, not as a matter of substantive negligence but as notice to the mine operator of conditions existing that call for the exercise of care on the part of the operator to guard against injury from the existence of such conditions, and the care must be commensurate with the dangers apparent.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 394.

See *Erickson v. Maple Block Coal Co. (Iowa)*, 167 Northwestern 105, p. 107.

LIABILITY FOR FAILURE TO PROVIDE SAFE PLACE—PRESUMPTION AND BURDEN OF PROOF.

When a miner engages in the employment of a mine operator the duty arises on the part of the employer to see that the place in which the miner was called upon to discharge his duties to the employer was reasonably safe, and when injured by the fall of slate, the resulting injury makes a *prima facie* case that the employer had not discharged his duty and the burden is then upon the employer to show that the place was in fact reasonably safe in order to escape liability. A showing that the place was not reasonably safe met by a counter showing that the employee himself was negligent and that his negligence contributed to the injury does not meet the requirements of the law and exonerate the employer. Such showing may affect the amount of recovery but it is no defense. To escape liability the employer must show that he was not negligent in respect to this matter, or that his negligence did not cause the injury, or that the injury was due to some willful misconduct on the part of the employee or was the result of his intoxication.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

RELATIVE DUTY OF OPERATOR AND MINER—MINER'S WORKING PLACE.

The Iowa statute does not itself fix, and from the statute itself it can not be determined where the working place of a miner is; but presumably it is where he is working and in the room in which he is engaged in mining coal. The statute imposes the duty upon the mine foreman to make careful inspection of the mine; to see that the mine is supplied with props; and it is made the duty of each miner to examine his working place. It is the duty of the mine foreman to

make such reasonable inspection as is reasonably necessary to ascertain the true condition generally of the mine and of the room in which a miner is working. The miner's working place does not include the roadway in his room where the miner's operations have advanced and tracks have been laid. But where a miner called the mine foreman's attention to the dangerous condition of the roof of his room over the roadway and requested that it be made secure and on the failure of the foreman to secure the place, the miner for his own protection may prop or otherwise secure the dangerous roof over the roadway, and if injured or killed while engaged in so doing the mine operator is liable, where the operator has rejected the provisions of the workmen's compensation act.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 395.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

SAFE APPLIANCES.

FAILURE TO SUPPLY SAFE APPLIANCE.

A mine operator may be liable for injuries to a miner operating a drill by compressed air because of the failure to furnish a suitable and proper valve on the line of pipe supplying the compressed air to the machine operated by the injured miner and where by reason of the failure to supply the pipe with a proper valve the entire force of compressed air in the main line was turned into the branch operating the miner's machine, thereby causing the injuries complained of.

Loveless v. Cunard Mining Co. (Mo. App.), 201 Southwestern 375, p. 379.

DUTIES IMPOSED ON MINER.

MINER'S DUTY TO PROP WORKING PLACE.

The statute of Iowa (sec. 2489-16a, Code Supp. 1913) makes it the duty of each miner to examine his working place and not to commence work until it is made safe. It requires that he shall securely prop and timber the roof of his working place. This duty of the miner to examine his working place and to prop and timber the roof is limited to the miner's working place and does not necessarily include the whole room. The miner's working place is the place where he is engaged in his work, and while so engaged it is his duty to timber and make safe the place where he is working.

Erickson v. Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

DUTY TO INSPECT ROOF AFTER BLAST.

The statute of Kentucky (sec. 2738b) authorizes a mine operator to make and post rules for the government and protection of the

miners. A rule adopted and posted pursuant to the statute made it the duty of a miner to inspect the roof after each blast as the work progressed and to cease working and leave the place and report to the mine foreman, or his assistant, whenever the room became unsafe. A miner violating this rule and failing to inspect the roof of his working place after a blast, and remaining in a dangerous place, can not recover of the mine operator for a consequent injury.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 923.

DUTY TO PROP WORKING PLACE.

The statute of Arkansas (sec. 5352, Kirby's Digest) makes it the duty of a mine operator to furnish props and also makes it the duty of the miner to prop or otherwise make safe his working place. It is the duty of the miner under the statute to request props when needed. In an action by a miner for injuries caused by a fall of rock from the roof on the ground that the operator failed to furnish props when required, the mine operator can not escape liability on the ground that the miner did not want or need the props for the reason that he attempted to take down or remove the rock that appeared dangerous, and after some efforts decided that the rock was not dangerous and continued working until injured and that the injury was the result of the miner's mistaken judgment and not from the failure of the operator to furnish props.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 923.

FAILURE TO EXERCISE CARE—DEFENSE.

The Indiana employer's liability act does not restrict the defense that the conduct of a miner under the circumstances which resulted in his injury was not consistent with reasonable care for his own safety.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 926.

VIOLATION BY MINER.

VIOLATION BY MINE MANAGER—LIABILITY FOR DAMAGES.

The mines and mining act of Illinois (Hurd Rev. Stats. 1915-16, ch. 93), makes the willful failure to comply with the provisions of the act under certain circumstances a misdemeanor and punishable accordingly. The act imposed upon the mine operator certain duties and gives a right of action to any one injured by reason of the failure of the operator to perform the duties imposed. The statute also in terms provides that in case of the enactment of a workmen's compensation act its provisions, if accepted, by the employer, shall be in lieu

of a right of action for damages. This, as well as other provisions, clearly indicates that the right given for civil actions for damages was limited to the mine operator and accordingly an injured miner can not maintain a joint action against a mine operator and a mine manager for damages for injuries occasioned by either a violation of the statute or a failure to comply with some of its provisions.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 438.

RIGHT TO RECOVER FOR INJURY.

The mere fact that a person is violating a penal statute when he receives an injury caused by the negligence of another will not of itself bar a recovery, but whether such fact will have that effect depends on the relation between the alleged violation and the injury. If the unlawful act was a contributing cause of the injury then it will bar a recovery, but if it is merely a condition or an attendant circumstance it will not defeat an action. On this theory a boy 14 years of age injured while employed in a mine will not be denied a recovery because the employment of a boy of that age was a violation of the statute.

Vandalia Coal Co. v. Butler (Ind. App.), 119 Northeastern 34, p. 39.

CUSTOM NOT SUFFICIENT EXCUSE.

The Statute of Iowa (Code Supp. 1913, sec. 2486j), expressly prohibits a miner in a mine from crossing the bottom of a shaft. Proof of a custom in a particular mine to the effect that under certain circumstances and under a certain method of operating the cages the miner in control of the cars was in the habit of crossing the shaft is not a sufficient excuse for the violation of the plain provisions of the statute.

Dennis v. Gibson (Iowa), 165 Northwestern 1030, p. 1031.

EMERGENCY NOT A SUFFICIENT EXCUSE.

The statute of Iowa (Code Supp. 1913, sec. 2486j), expressly prohibits certain employees from crossing the bottom of a shaft in a coal mine. A miner was employed to remove empty cars and those loaded with supplies from the cages at the bottom of the shaft and to put loaded cars onto the cages and to oversee the loading and unloading of miners. It was also his duty to jerk a rope and disconnect the trip cars from a cable and to kick a latch, thereby switching cars toward the cage on which to be loaded. It was necessary to jerk the rope promptly to prevent cars from piling up on the incline toward the bottom of the shaft. The miner thus employed and while on the opposite side of the shaft noticed a trip coming in on the cable and believing that an emergency existed for the jerking of the rope and

the kicking of the latch to prevent the cars from piling up, attempted to cross the bottom of the shaft, and while doing so was struck and injured by a descending cage. The supposed emergency requiring the prompt action was not a sufficient excuse and did not justify the miner in violating the plain provisions of the statute, and the violation of the statute was sufficient to prevent a recovery for the injuries so received.

Dennis v. Gibson (Iowa), 165 Northwestern 1030, p. 1031.

MINER'S WORKING PLACE.

DUTY OF MINERS TO MAKE PLACE SAFE.

The statute of Iowa (workmen's compensation act, sec. 2489-16a), makes it the duty of each miner to examine his working place upon entering the same and prohibits him from beginning work until the place is safe. He is required to prop and timber securely the roof of his working place and to obey any order given by the mine foreman. A miner's working place does not include the part of his room that has been worked out by him and where the track has been laid for the purpose of running cars for loading and removing coal from his room. If the roof becomes dangerous at a place over the roadway or tracks and the mine foreman fails on request of the miner to make the dangerous place safe, the miner may for his own protection make the dangerous place safe and if in undertaking to do so he is injured or killed the mine operator may be held liable.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 395.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

KNOWLEDGE OF DANGER—EFFECT ON EXERCISE OF CARE.

The knowledge or opportunity for knowledge on the part of a miner of a hazard or danger inherent in the employment is of importance under the Indiana employer's liability act only as it affects the issue of his care and conduct under the circumstances.

J. Woolley Coal Co. v. Tervault (Indiana), 118 Northeastern 921, p. 926.

NEGLIGENCE OF MINE SUPERINTENDENT OR FOREMAN.

DUTY OF INSPECTION—EXTENT AND LIABILITY.

The statute of Kentucky makes it the duty of a mine foreman to visit all working places in a mine at least twice a week. Notwithstanding these statutory requirements it would be impossible for a mine foreman to watch the progress of each miner's work for dangers that might develop in the progress of the work; and notwithstanding the provisions of the statute this particular duty is not imposed upon the mine foreman.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 922.

SHIFT BOSS—VICE PRINCIPAL.**AUTHORITY AS VICE PRINCIPAL.**

A shift boss or foreman in a mine is a vice principal when performing or aiding to perform the duties which by law devolve upon the mine operator. If the act which the shift boss or foreman performs is one that pertains to the duty which the mine operator owes to a miner the operator is responsible for its performance irrespective of the rank of the servant to whom it is intrusted.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 474.

AUTHORITY OF SHIFT BOSS—AUTHORITY AS VICE PRINCIPAL—LIABILITY OF OPERATOR.

A shift boss had charge of the mining operations upon certain levels of a mine and had superintendence of the work of from 35 to 40 men. He did no manual labor, but his entire time was given to directing and superintending the work of others and ordinarily he was able to visit each place where the work was going on at least two times during each shift. He had authority to direct a miner to go to work in a particular place and informed him in substance that he had inspected the rock and that the place was safe. The absence of evidence that the shift boss had no authority to make the inspection and to give the assurance of safety is sufficient to make the mine operator liable for his negligence.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 473.

SHIFT BOSS AS VICE PRINCIPAL.

A shift boss having charge of mining operations upon certain levels of a mine and who by the rules of the mining company was given ultimate authority to determine the safety of a miner's working place, is in these duties the vice principal of the operator and the latter is liable for the negligence of the shift boss in these particulars.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 473.

FELLOW-SERVANT RULE—DEFENSE ABROGATED.**NEGLIGENCE OF FELLOW SERVANT NO DEFENSE.**

The statute of Missouri (sec. 5440, R. S. 1909), provides that mining corporations operating lead, zinc, coal, or other mines shall be liable for all damages sustained by any miner or employee while engaged in operating the mine by reason of the negligence of any other agent or servant; but it may be shown in defense that the person injured was guilty of negligence contributing as a proximate

cause to produce the injury. Under this statute the negligence of a fellow miner either in causing or contributing to the injury of the complaining miner is not a defense to the action.

Loveless v. Cunard Mining Co. (Mo. App.) 201 Southwestern 375, p. 379.

EFFECT ON CONTRIBUTORY NEGLIGENCE.

DEFENSE ABROGATED.

The employer's liability act of Indiana expressly declares that no injured employee shall be held guilty of contributory negligence solely by reason of his assumption of certain risks of his employment.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 924.

VIOLATION OF STATUTE—DEFENSE ABROGATED.

The statute of Arkansas (sec. 5352, Kirby's Digest), imposes the duty on the owner or operator of a mine to keep a sufficient amount of timber for props and to send down props when required. Where the violation of this statute is the proximate cause of an injury to a miner, the mine operator, in an action for such injury, can not invoke the defense of contributory negligence.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 923.

VIOLATION OF STATUTE ENACTED FOR SAFETY OF EMPLOYEES.

The statute of Arkansas (acts 1913, act 175), expressly provides that where the violation of any statute enacted for the safety of employees contributes to the injury or death of an employee, the employer can not invoke the defense of contributory negligence.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 923.

CONTRIBUTORY NEGLIGENCE AS PROXIMATE CAUSE.

Under the statute of Missouri (sec. 5440, R. S. 1909), it may be shown in defense to an action by a miner for personal injuries that he was guilty of negligence contributing as a proximate cause to produce the injury. A mine operator may be liable for injuries to a miner caused by the negligence of a fellow miner or coemployee, in the absence of proof that the injured miner was guilty of negligence contributing to the injury.

Loveless v. Cunard Mining Co. (Mo. App.), 201 Southwestern 375, p. 379.

VIOLATION BY MINER DEFEATS RECOVERY.

The statute of Iowa (sec. 2486j), expressly prohibits employees from crossing the bottom of a shaft in a coal mine, but excepts cer-

tain persons whose employment may require the crossing of a shaft. A miner or an employe not included in the exception who attempted to cross the bottom of a shaft in violation of the statute and was injured by a descending cage is guilty of such contributory negligence as will defeat a recovery for his injuries.

Dennis v. Gibson (Iowa), 165 Northwestern 1030, p. 1032.

RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Under the Iowa workmen's compensation act contributory negligence of an injured miner will not defeat his right to recover. In any event if the negligence of the mine operator is a contributing cause to the injury, liability attaches.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 395.

EXERCISE OF CARE—QUESTION OF FACT.

The employer's liability act of Indiana declares that the fact alone that the employee took chances in encountering any of the dangers enumerated and whether his act in so doing is denominated contributory negligence or assumption of risk, shall not constitute a defense in an action to recover for resulting injuries if it further appears that he used due care for his own safety. In this sense the term "contributory negligence" is used in the statute. Thus the question as to whether the conduct of a miner while encountering a hazard which the statute says he does not assume was characterized by due care still remains an issue that is to be determined in each instance as a question of fact.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

EFFECT ON ASSUMPTION OF RISK.

DEFENSE ABROGATED.

Where the proximate cause of injuries to a miner was the failure of the mine operator to furnish props, the mine operator can not, in an action by the miner for damages for injuries caused by a fall of rock from the roof, invoke the defense of assumption of risk.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 923.

Under the employer's liability act of Indiana the defense that inherent or apparent dangers and hazards contributed to the injury complained of is expressly abrogated in all cases where such injury is the proximate result of negligence on the part of the employer.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

NEGLIGENCE OF EMPLOYER—DEFENSE ABROGATED.

The Indiana employer's liability act of 1913 in all actions to which it is applicable abrogates under all circumstances the defense that an injured employee assumed the risk of the hazards or dangers which caused his injury, provided such danger or hazard was the result of negligence on the part of the employer or his agent, servant, officer, or other employee.

J. Woolley Coal Co. v. Tevault (Indiana), 118 *Northeastern* 921, p. 926.

DEFENSE RESTRICTED.

It was clearly the legislative intent in enacting the employer's liability act of Indiana greatly to restrict the defense of assumed risks in personal injury actions between an employer and employee in all industries to which the act is applicable.

J. Woolley Coal Co. v. Tevault (Indiana), 118 *Northeastern* 921, p. 924.

RISKS TRACEABLE TO EMPLOYER'S NEGLIGENCE.

An employee in the course of his employment assumes no risk incident to the business, where the risk can be traceable to the employer's negligence.

Mitchell v. Swanwood Coal Co. (Iowa), 166 *Northwestern* 391, p. 393.

OPERATOR WITHOUT NEGLIGENCE.

Where a risk which resulted in an injury to a miner contains no negligence on the part of the mine operator, such risk is assumed by the miner.

J. Woolley Coal Co. v. Tevault (Indiana), 118 *Northeastern* 921, p. 926.

VIOLATION OF STATUTE MADE FOR SAFETY OF EMPLOYEES.

The statute of Arkansas (acts 1913, act 175), expressly provides that where the violation of any statute enacted for the safety of employes contributes to the injury or death of an employee, the employer can not invoke the defense of assumption of risk.

Western Coal & Mining Co. v. Watts (Arkansas), 199 *Southwestern* 921, p. 923.

FAILURE TO VENTILATE—ASSUMPTION OF RISK NOT APPLICABLE.

The statute of Oklahoma requires a coal-mine operator to use ordinary care to keep a sufficient current of air at the face of a miner's working place to dilute and render harmless the dangerous and explosive gases. In an action by a miner for damages for injuries

caused by a breach of this statutory duty, the doctrine of assumption of risk is not applicable to the theory of the miner's cause.

Rock Island Coal Mining Co. v. Toleikis (Oklahoma), 171 Pacific 17, p. 19.

CONTINUING TO WORK WITH KNOWLEDGE OF NEGLIGENCE.

Under the workmen's compensation act of Iowa a miner assumes no risk that arises out of or that can be traced to the negligence of the mine operator although continuing to work with knowledge of the negligence and without complaint or promise to repair.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 395.

KNOWLEDGE OF DANGER—CONTINUING TO WORK WITHOUT PROMISE OF REPAIR.

The rule that where a miner knows of the mine operator's negligence and continues working in a place that he knows or should know imperils his safety and does this without complaint and without promise of repair, he assumes the added risk incident to the negligence of the operator and waives his negligence, no longer applies as this rule has been abolished by the Iowa workmen's compensation act where the mine operator elects to reject the provisions of the act.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 396.

EXERCISE OF CARE—NEGLIGENCE OF OPERATOR.

The employer's liability act of Indiana provides that no injured employee whose own conduct at the time is characterized by due care shall be denied a recovery under the statute because of assumed risk if it appears that negligence on the part of the mine operator in any of the particulars enumerated therein caused such risks and proximately contributed to his injury.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

NEGLIGENCE OF FELLOW SERVANT—RISK NOT ASSUMED.

Section 1 of the employer's liability act of Indiana (acts 1911, sec. 8020a, Burns, 1914), abrogates the common-law rule of assumed risks in so far as it applies to the particular risk of injury through the negligence of a fellow servant; and the failure of a fellow servant to exercise reasonable care for the safety of a co-worker engaged in a common employment is now deemed to be a breach of duty on the part of the mine operator and is governed by the rules of law applicable thereto.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 923.

CUSTOM.**EFFECT ON STATUTORY REGULATION.**

The custom and practice of a mine operator or of the mine operators generally throughout a given mining district, to the effect that at no time were practical miners instructed in reference to the manner in which a miner should place, load, drill, tamp, and fire shots at his working place in a mine, and to the effect that a certified miner was not instructed how to place his shots, drill his holes, make his cartridges, tamp the cartridges, place the fuse or squib and light and fire the same, although universal and well known, could not affect the positive provisions of the statute or relieve a coal-mine operator of a statutory duty.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

EMPLOYER'S LIABILITY ACT.**CONSTITUTIONALITY.**

The employer's liability act of Indiana (acts 1911, chap. 88), is constitutional in all its provisions.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 922.

CONSTRUCTION AND APPLICATION.

The phrase "dangers or hazards inherent or apparent," as used in section 2 of the Indiana employer's liability act and the reference to defects in "working places, tools, implements or appliances," in section 3 are synonymous in their practical interpretation.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

CONSTRUCTION—QUESTIONS OF FACT.

Under the Indiana employer's liability act of 1911 all questions of negligence, contributory negligence, and assumption of risk are to be determined by the jury as issues of fact.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 926.

PENNSYLVANIA EMPLOYER'S LIABILITY ACT—CONSTRUCTION.

Neither the employer's liability act nor the mining statutes of Pennsylvania make the employer or mine owner an insurer of the safety of the mine. In an action by an injured miner under the employer's liability act the plaintiff must prove affirmatively as a prerequisite for recovery that the mine operator had been guilty of some actionable negligence.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 434.

ACTION BY INJURED MINER—RIGHT OF RECOVERY.

A miner employed as a helper to the operator of a machine used in cutting under the coal, and whose work required him to kneel near the face of the coal and shovel back the slack and coal cut away by the machine, and who was injured while in this position by a fall of coal from the face of the vein, can not recover where the jury finds either: (1) that his conduct under the circumstances was not characterized by due care for his own safety, in which case he was guilty of contributory negligence; or (2) that the danger or hazard which caused the injury was not known and could not have been known to the mine operator in time to have remedied the condition, or was necessarily incidental to the employment, as in such case the mine operator was not negligent and the miner assumed the risk of injury from such danger or hazard by continuing at his work.

J. Woolley Coal Co. v. Tevault (Indiana), 118 *Northeastern* 921, p. 926.

DEATH OF MINER—LIABILITY—PLEADING.

A complaint in an action under the Alabama employer's liability act (sec. 3910, subdivision 3, Code 1907), was sufficient where it charged that the defendant was operating a coal mine; that the plaintiff's intestate was in the employment of the defendant as a brusher; that while so employed in defendant's mine the intestate was injured and killed by an explosion in the mine; that the intestate's death was the proximate consequence of and was caused by reason of the negligence of a person in defendant's employment to whose orders the intestate was bound to conform, and that such person negligently ordered the intestate to examine a portion of the mine for gas or brush out the gas from a portion of the mine, and that while so engaged the plaintiff's intestate was injured and killed by an explosion of gas.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 *Southern* 547, p. 550.

PLEADING—SUFFICIENT STATEMENT OF FACTS.

A complaint by a miner for injuries sustained while in the course of his employment in a mine was drawn under the Indiana employer's liability act of 1911, and proceeded on the theory that the complainant received his alleged injuries by reason of the negligence of a fellow servant in the employ of the mine operator. As the complaint contained facts sufficient to constitute a cause of action on the theory on which it proceeded independent of any matters properly denominated as conclusions, there was no available error in overruling a motion to strike out the statements denominated as conclusions.

Vandalia Coal Co. v. Butler (Ind. App.), 119 *Northeastern* 34, p. 36.

NO LIABILITY WITHOUT NEGLIGENCE.

The employer's liability act of Indiana (acts 1911, chap. 88) does not purport to authorize a recovery for injuries sustained by a miner without negligence on the part of the mine operator or those for whose acts he is responsible, and such negligence still remains the essence of liability in all actions brought under the provisions of the act.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 922.

INJURY AS PROXIMATE RESULT OF EMPLOYMENT—ASSUMPTION OF RISK.

Where an injury complained of by a miner is the proximate result of a danger or hazard necessarily incident to a particular employment, and which may not be obviated by the mine operator in the exercise of ordinary care for the safety of the miners, the risk of injury from such danger or hazard is assumed by the miner as an element in his contract of employment.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 926.

EMPLOYER'S WANT OF KNOWLEDGE OF DANGER—EMPLOYEE'S ASSUMPTION OF RISK.

Where it appears that a defect in the place of work or in the tool, implement, or appliance furnished to an employee by his employer, and which caused the employee's injury, was not known to the employer and could not have been known to him in the exercise of ordinary care in time to have removed the condition, the employee is held to have assumed the risk of injury.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 926.

LIABILITY OF EMPLOYER—SUPERINTENDENCE DELEGATED.

Subdivisions 1 and 2 of section 3910 of the Alabama employer's liability act (Code, 1907) provides that when a personal injury is received by an employee the employer is liable to the injured employee as if he were a stranger if the injury is caused by any defects in the conditions of the ways, works, or plant connected with or used in the business of the employer, or when the injury is caused by reason of the negligence of any person in the service or employment of the employer who has superintendence intrusted to him while in the exercise of such superintendence. An employee in a mine injured by reason of a defective appliance or defective machinery while at work in a place he was directed to work by the superintendent is within both subdivisions 1 and 2 of section 3910 because of the injury resulting from defective machinery and because he was directed to work at the place by the mine superintendent.

Sloss-Sheffield Steel & Iron Co. v. Russell, 247 Federal 289, p. 291.

INDUSTRIAL INSURANCE LAW.**NATURE AND CONSTRUCTION OF WASHINGTON'S INDUSTRIAL INSURANCE LAW.**

The industrial insurance law of Washington is not an employer's liability act. It is not even an ordinary compensation act, but an industrial insurance statute. Its administrative body is entitled the "Industrial Insurance Commission." All the features of an insurance act are present. Not only are all remedies between master and servant abolished and all phases of them withdrawn from private controversy, but an employee is no longer to look to the employer even for the scheduled and mandatory compensation.

Ellamar Mining Co. v. Possus, 247 Federal 420, p. 422.

See *Stertz v. Industrial Insurance Commission*, 91 Washington 588; 178 Pacific 256.

WASHINGTON'S INDUSTRIAL INSURANCE LAW—CONSTRUCTION AND PURPOSE.

The purpose of the industrial insurance law of Washington (3 Rem. & Ball. Code, sec. 6604, seq.) was to remove from the courts personal injury actions by employees and was intended to cover not only injuries but aggravations through negligence of a physician engaged by masters and paid out of sums deducted from the wages of the employees. The intention of this law was to withdraw from private controversy all phases of civil causes for personal injuries to employees and to abolish the jurisdiction of courts over such cases. The purpose of the act was to end all litigation growing out of, incident to, or resulting from the primary injury, and in lieu thereof to give the workmen one recovery in the way of certain compensation and to make the charge upon the contributing industries alone.

Ellamar Mining Co. v. Possus, 247 Federal 420, p. 421.

See *Ross v. Erickson Construction Co.*, 89 Washington 634, 155 Pacific 153.

WORKMEN'S COMPENSATION ACT.**ALASKAN WORKMEN'S COMPENSATION ACT—CONSTRUCTION.**

The essential features of the workmen's compensation act of Alaska are the limitations of its provisions to cases of death or injury to employees "in the mining industry of the Territory," the limitations and specifications of the amounts recoverable in cases of death or injury and the specified liabilities and the joinder in one action of all claimants injured in the same cause. It provides for a trial to be maintained and determined in and by the courts of the Territory and to be governed by the law of procedure applicable to other actions for

the recovery of money. The judgment when rendered creates a personal liability against the employer and not against a fund created by contributions from or assessments against other employers.

Ellamar Mining Co. v. Possus, 247 Federal 420, p. 422.

CONSTRUCTION—ANNUAL EARNINGS—MEANING.

In the construction of the Iowa workmen's compensation act (code Supp. 1918, sec. 2477m9, et. seq.) a court will not strain the enactment into an utter absurdity, but instead it must aim to give every word enacted force and effect, if that may in reason be done. This may be done in reference to this act by assuming that the legislature knew annual earnings from the same employer for the year next preceding an injury were always determinable, and that it directed some computations to be made on a basis other than treating annual earnings as 300 times the average daily earnings, and knowing that annual earnings were always ascertainable and that different standards of computation were provided for, the intention was that 300 times the average daily earnings should be treated as the annual earnings unless the statute provided a different basis for determining annual or other earnings.

Richard v. Central Iowa Fuel Co. (Iowa), 166 Northwestern 1059, p. 1060.

SECTIONS OF IOWA ACT CONSTRUED TOGETHER—BASIS FOR ANNUAL EARNINGS.

In construing the workmen's compensation act of Iowa section 2477m15 must be taken into consideration in construing subdivision i of section 2477m9, in ascertaining the annual earnings. Paragraph (f) of section 2477m15 provides as to employees in employments in which it is a custom to operate for a part of the whole number of working days in each year such number shall be used instead of 300 as a basis for computing the annual earnings. Where there is proof that the mines in which the injured applicant worked were operated 220 days in the year, the computation must be worked out by creating a dividend out of multiplying the average daily earnings by 220 instead of by 300.

Richard v. Central Iowa Fuel Co. (Iowa), 166 Northwestern 1059, p. 1060.

PURPOSE AND CONSTRUCTION—MASTERIAL DUTIES.

The legislature in framing subdivisions c (4) of section 2477m (Supp. Code 1913), had in mind the condition of the law touching the subject matter covered by the statute and recognized that an employer owed certain masterial duties to his employees, a failure to discharge which resulting in injury, created a liability on the part of the em-

ployer. The legislature also recognized that it was the duty of an employer, among other masterial duties, to exercise reasonable care to see that an employee had a reasonably safe place in which to work; that it was the duty of the employer to furnish the employee reasonably safe tools and appliances with which to work; that a failure to do either, resulting in injury, created a liability on the part of the employer. It also recognized that these matters were susceptible of proof; that under the law as it had existed the burden rested on an injured employee to prove the negligence of the employer in respect to these matters as well as the injury itself. The legislature may have assumed that ordinarily no injury arises to an employee when the employer has discharged all his legal duties to the employee and the legislature saw fit to provide that an injury occurring to an employee while in the course of his employment is presumptive evidence that the employer failed to discharge some of these duties and the legislature thought it proper and wise to provide that in all suits growing out of injuries arising in this way the burden should be on the employer to exculpate himself and to show that the injury did not result from any failure on his part to discharge his duty to the employee.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

RELATION OF EMPLOYER AND EMPLOYEE—RIGHT TO COMPENSATION.

It is the work which the workman is performing at the time he is injured that determines whether or not he is at the time the servant of another and is engaged in the discharge of that duty under his employment. A person employed as a teamster, and belonging to the class called extras, furnished his own wagon and team and was paid by the tonnage hauled. There was no regular employment, but the employment was irregular, extending for a day or two at a time. The teamster would sometimes procure his own orders and bring them with him to the mine, obtain the coal, and was charged therefor at the regular mine price, which was accounted for and paid when the coal was delivered and the amount collected. In such case the teamster received, as his profit or compensation for hauling, the difference between the mine price and the price on reselling. A teamster thus engaged and killed while hauling coal for himself with his own team and wagon, in his own way, to his own home, and over the route which he chose for himself, and for which delivery he was not to receive any pay from the mine operator, and who was charged for the coal the mine price, was not an employee of the mine operator within the meaning of the workmen's compensation act of Indiana.

Sugar Valley Coal Co. v. Drake (Ind. App.), 117 Northeastern 937, p. 938.

ACTION FOR INJURIES—PLEADING.

The Illinois workmen's compensation act of 1913 provides that no common law or statutory right to recover damages for an injury sustained by an employee while in the line of his duty, other than the compensation provided in the act, shall be available to any employee who is covered by the provisions of the act. It is essential, therefore, to the statement of a cause of action for a negligent injury by a miner against a mine operator that it should appear that the miner was not covered by the provisions of the act.

Beveridge v. Illinois Fuel Co. (Illinois), 119 Northeastern 46.

PLEADING—STATEMENT OF CAUSE OF ACTION—NEGATING DEFENSE.

In pleading a cause of action under the Iowa workmen's compensation act (sec. 2477m, subdivision 4 (4), Supp. Code, 1913), a plaintiff is not bound to allege more than he is required to prove in order to establish his right to recover. He is not required to negative any fact which the defendant is bound to allege and prove as a defense. The fact that his cause of action may be bottomed on negligence does not require him to aver any negligence, or to set out the specific acts of negligence; and he is not required under the statute to plead or prove specific acts of negligence as a basis for a recovery. It is sufficient if he alleges and proves the employment, and that he was injured in the course of his employment and the law steps in and says in effect that the injury is presumed to be the result of the employer's negligence, and the burden rests on him to show that this is not true, and unless he does so, he shall be holden to answer for the injury.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 393.

ACTION FOR INJURIES—PRESUMPTION AND PLEADING.

The Illinois workmen's compensation act provides that every employer engaged in mining shall be conclusively presumed to have elected to provide and pay compensation according to the provisions of the act unless and until notice in writing of his election to the contrary is filed with the industrial board and until such mine operator shall have either furnished his employees personally or posted at a conspicuous place where the miner is employed a copy of his notice of election not to provide and pay compensation according to the act, and until such time it is unnecessary for a miner suing for injuries to allege that the mine operator has elected not to pay compensation according to the act as it is unnecessary to allege a fact which the law presumes to exist.

Beveridge v. Illinois Fuel Co. (Illinois), 119 Northeastern 46.

INJURIES ARISING "OUT OF AND IN THE COURSE OF EMPLOYMENT"—
MEANING.

A miner injured while working in a mine in Alaska brought suit under the workmen's compensation act to recover compensation for injuries received by him in the course of his employment and to recover damages for the aggravation of his injuries and for his suffering by reason of the mine operator's negligence to furnish him timely and sufficient surgical and medical and hospital care. The plaintiff alleged that under the mine operator's rules the sum of \$1.50 per month had been deducted from his wages for hospital dues and this entitled him to care in a hospital and to competent surgical and medical attention at the expense of the employer. The provision permitting a recovery for death or injury arising "out of and in the course of employment" is limited to injuries arising out of the employment where there is a causal connection between the working conditions and the injury and where it is possible to trace the injury to the nature of the employer's work, or to the risk to which the employer's business exposes the employee. The provision embraces only those accidents which happen to an employee while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further directly or indirectly the master's business. It can not be held to include the aggravation of an injury caused by the negligence or unskillful medical treatment of his injuries, as these do not rise "out of and in the course of employment" within the meaning of that phrase as used in the statute.

Ellamar Mining Co. v. Possus, 247 Federal 420, p. 422.

ACCIDENT ARISING IN COURSE OF EMPLOYMENT—BURDEN OF PROOF.

In all cases brought under the workmen's compensation act of Indiana the burden is on the claimant to furnish the evidence from which the inference can reasonably be drawn that the injuries complained of were caused by an "accident arising out of and in the course of his employment," within the meaning of the workmen's compensation act.

Sugar Valley Coal Co. v. Drake (Ind. App.), 117 *Northeastern* 937.

INJURY WHILE IN SCOPE OF EMPLOYMENT—NEGLIGENCE—PRIMA FACIE
CASE.

When a miner in an action for damages for injuries under the Iowa workmen's compensation act has established the employment and has shown that the injury arose out of and in the course of his

employment, a prima facie case of negligence is made against the mine operator and this prima facie case rests on the assumption that if the employer had discharged his duties the condition would not exist which produced the injury to the employee while in the course of his employment.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 393.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

WORKMEN'S COMPENSATION ACT OF ALASKA IS ELECTIVE—ELECTIVE PROVISIONS.

The workmen's compensation act of Alaska is elective and not compulsory, and applies to those only who choose to avail themselves of its provisions and agree to abide by its terms. All rights thereunder have their origin in the agreement of the parties. An injured employee does not recover on a liability arising out of the employer's negligence, but on a liability arising out of contractual obligation, and which exists irrespective of the employer's negligence. The act eliminates all consideration of tort, penalty, or negligence.

Ellamar Mining Co. v. Possus, 137 Federal 420, p. 423.

EMPLOYER'S ELECTION NOT TO PAY COMPENSATION—PROOF OF NEGLIGENCE.

A mining company that elects not to provide and pay compensation according to the workmen's compensation act of Illinois is deprived of certain defenses, and a miner suing such mining company for damages for injuries caused by its alleged negligence is not relieved by the statute from proving negligence of the mining company.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

FAILURE OF MINE OPERATOR TO ELECT—PROOF.

In an action by a miner under the Illinois workmen's compensation act for damages for injuries received while working in a mine it is not sufficient to prove that the mine operator refused, and had elected not to come under the provisions of the workmen's compensation act (*Laws* 1913, p. 335), by introducing into evidence a notice signed by the president and secretary of the mining company, in which it was stated that it was given in conformity with the provisions of section 2 of the act. But in addition to this it is necessary to prove that a copy of such notice was either furnished to the miner or was posted at the place where he was employed.

Beveridge v. Illinois Fuel Co. (Illinois), 119 Northeastern 46.

REJECTION BY OPERATOR—INJURY TO MINER—PRESUMPTION OF NEGLIGENCE.

When a coal mine operator elects to reject the provisions of the Iowa workmen's compensation act and a miner sues for damages for injuries received in the course of his employment, proof that the injury was so received makes a *prima facie* case, or creates the presumption of negligence, and the burden is then upon the mine operator to show his freedom from negligence. Proof of the contributory negligence of the injured employee is not a defense, but the employer to escape liability must show that he was not negligent in respect to the particular matter complained of, or that his negligence did not proximately cause the injury, or that the injury was due to the willful misconduct of the employee, or that the employee was intoxicated.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

NEGLECT—PRESUMPTION FROM INJURY.

The workmen's compensation act of Iowa (sec. 2477m, subdivision 4 (4), Supp. Code 1913) expressly provides that where an employer has rejected the provisions of the act it shall be presumed in an action by an employee for damages for an injury sustained in the course of his employment that such injury was a direct result and grew out of the negligence of the employer, and that such negligence was the proximate cause of the injury and the burden of proof rests upon the employer to rebut the statutory presumption of negligence.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

Erickson v. Mapleblock Coal Co. (Iowa), 167 Northwestern 105, p. 106.

FINDINGS OF INDUSTRIAL BOARD—FORCE AND EFFECT.

The finding of the Industrial Board on claims presented under the workmen's compensation act of Indiana have the same force as the finding of a court or the verdict of a jury and are not to be set aside if there is any evidence on which they can rest.

Sugar Valley Coal Co. v. Drake (Ind. App.), 117 Northeastern 937.

AWARD OF INDUSTRIAL BOARD—ATTORNEY FEES.

Where the arbitrator and the Industrial Board render a decision in favor of a claimant and no review is petitioned for or had by the party paying the compensation, the Illinois Workmen's Compensation Act gives no authority to allow an attorney's fee to be taxed against the party paying the compensation unless he refuses to pay such compensation, or some of the installments thereof, when they become due.

McMurray v. Peabody Coal Co. (Illinois), 118 Northeastern 29, p. 33.

APPEAL FROM AWARD OF INDUSTRIAL BOARD—JURISDICTION AND
AUTHORITY OF COURT.

On appeal from an award for compensation allowed by the Industrial Board under the provisions of the Illinois workmen's compensation act of 1913, the circuit court is without jurisdiction to review the action of the Industrial Board when a certified copy of the order of the board is filed to obtain judgment in accordance with the statute. The court is only authorized to enter a judgment upon the showing being made that the requirements of the statute have been met.

McMurray v. Peabody Coal Co. (Illinois), 118 Northeastern 29, p. 31.

APPEAL FROM WORKMEN'S COMPENSATION BOARD—FINAL JUDGMENT.

On appeal from the workmen's compensation board fixing the compensation for the death of a miner, it is not the duty of the common pleas court to remand the case to the board for a further and final action, but it is the duty of the court to enter a final judgment on awarding to the dependent the amount due.

Rakie v. Jefferson & Clearfield Coal Co. (Pennsylvania), 103 Atlantic 302.

APPLICATION FOR JUDGMENT—TRUTH OF MOTION AND AFFIDAVITS—PRE-
SUMPTION.

On an application to a court for a judgment on an order made by the Industrial Board the court must assume that the facts set forth in the motion or affidavits are true where no counter affidavits are filed.

McMurray v. Peabody Coal Co. (Illinois), 118 Northeastern 29, p. 32.

JUDGMENT ON AWARD—INTEREST ON PAST-DUE INSTALLMENTS.

Under the general statute of Illinois providing for interest when judgment is entered upon any award, a claimant under the workmen's compensation act is entitled to interest at the rate of 5 per cent per annum on an award of the Industrial Board on the past-due installments from the time the same become due and payable under the provisions of the award.

McMurray v. Peabody Coal Co. (Illinois), 118 Northeastern 29, p. 33.

COMPUTATION OF COMPENSATION.

In the operation of a coal mine in Iowa it was the custom for the mine operator to furnish the miners powder and blacksmithing for the special purpose of the employment and at specified prices under an agreement that these advances should be repaid out of the

wages. In an action by an injured miner under the workmen's compensation act of Iowa the rule established for compensation under such circumstances is stated thus: "Deduct from the gross earnings for the year preceding the injury the amount expended for powder and blacksmithing; divide this sum by a number equal to the number of days worked by the miner in that year, which was 220; multiply the result by 220 and divide by 104."

Richard v. Central Iowa Fuel Co. (Iowa), 166 Northwestern 1059, p. 1061.

COMPENSATION—DEDUCTIONS FOR ADVANCES.

Section 8 of the original workmen's compensation act of Iowa (sec. 2477m7, Code Supp. 1913) prohibits any contract, rule, regulation, or device whatsoever that shall operate to relieve an operator in whole or in part from any liability created by the act. If this provision stood alone there could be no deduction for powder and blacksmithing furnished by the employer to the miner, but the provision does not stand alone. Section 2477m15 (g) provides that for the purposes of computation, the earnings shall not include any sum which the employer has been accustomed to pay the employee to cover any special expenses entailed on him by the nature of the employment. In the agreement between the mine operator and the miner advances of this nature were taken into consideration in fixing wages. It seems that a mine operator had customarily made payments to the miner to cover the special expense of powder and blacksmithing which was entailed on the miner by the nature of his employment. The court concludes that the advancement made for such purpose can not be considered as earnings.

Richard v. Central Iowa Fuel Co. (Iowa), 166 Northwestern 1059, p. 1061.

AVERAGE WEEKLY EARNINGS—COMPUTING COMPENSATION.

The workmen's compensation act of Iowa (Code Supp., 1913) prescribes clearly that the compensation to an injured employee shall be half of the average weekly wages received. In order to ascertain what these average weekly earnings are there shall first be found the annual earnings during the year next preceding the injury; and these annual earnings shall be arbitrarily treated to be 300 times the average daily earnings. "Average weekly earnings" are as a matter of statute the fifty-second part of 300 times the average daily earnings of the year preceding.

Richard v. Central Iowa Fuel Co. (Iowa), 166 Northwestern 1069.

CONTRIBUTIONS TO SUPPORT—DEPENDENCY NOT REQUIRED.

The Illinois workmen's compensation act of 1913 (Laws 1913, p. 337) provides for compensation in case the employee leaves any child

whom he was under legal obligation to support, and also where the employee leaves children to whose support he had contributed within four years previous to the time of his injury. Under the latter provision it was not necessary that the children should be dependent upon the deceased, but only that the deceased had contributed to the support of the children within four years previous to his death. Under this provision if contributions to the support of the applicants were actually made within four years previous to the death of an employee the fact that the beneficiaries were not in such circumstances as to need the support of the deceased is immaterial. Neither is it material that the contributions indirectly aided the husbands of the daughters of the employee where they were direct contributions of a substantial nature to the daughters themselves.

Peabody Coal Co. v. Industrial Board (Illinois), 117 Northeastern 983, p. 984.

ALASKAN WORKMEN'S COMPENSATION ACT—RECOVERY FOR AGGRAVATION OF INJURY.

Under this act an injured person can not recover for aggravation to his injuries as the act limits the recovery to cases of death or injury arising "out of and in the course of employment." This phrase as used embraces only accidents which happen to an employee while he is engaged in the discharge of some function or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the master's business. An injury arises out of the employment if there is a casual connection between the working conditions and the injury, and it must be possible to trace the injury to the nature of the employer's work or to the risks to which the employer's business exposes the employee. Injuries arising "out of and in the course of employment" can not include aggravations caused by insufficient medical attention furnished by the employer pursuant to an agreement with the employees to furnish competent medical attention in case of the employees' injury or illness.

Ellamar Mining Co. v. Possus, 247 Federal 420, p. 422.

REPEAL OF STATUTE—DEPENDENCY.

The provision of the Illinois workmen's compensation act of 1913 (Laws 1913, p. 337), providing that where an employee left children to whose support he had contributed within four years previous to the time of his injury, was repealed by the act of 1917 (Laws 1917, p. 490). The act of 1913 did not require dependency as a condition of compensation, but dependency is now the test.

Peabody Coal Co. v. Industrial Board (Illinois), 117 Northeastern 983, p. 984.

ACTION FOR WRONGFUL DEATH.

APPLICATION TO NONRESIDENT ALIENS.

The statute of Utah (sec. 2912) gives a right of action for a wrongful death for the benefit of the widow and minor children. The statute is general in its terms and contains nothing indicating an intention to restrict its application to residents of the State or of the United States. Under its general provisions a right of action may be brought for the wrongful death of a miner in Utah for the benefit of the widow and minor children who are nonresident aliens, subjects of the Kingdom of Italy.

Bingham Mines Co. v. Bianco, 246 Federal 936.

ACTION BY ADMINISTRATOR—PLEADING.

In an action by an administrator for damages for the wrongful death of his intestate, a complaint is insufficient that fails to aver that the plaintiff sues as the administrator.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 550.

TIME FOR BRINGING SUIT—STATUTE OF LIMITATIONS.

A miner was killed while working in a coal mine in the State of Kentucky. He left surviving no widow, children, or father. His mother, a married woman, was appointed administratrix by the probate court of the proper county and thereupon brought an action to recover damages for the death of her son on the ground of negligence on the part of the mining company. The statute of Kentucky expressly provides that a married woman shall not be appointed executrix or administratrix. The Kentucky statute also provides that actions for injuries to persons or for wrongful death must be brought within one year. After the suit was begun the mother resigned her position as administratrix and a competent person was appointed. The new administrator was appointed more than a year after the death of the intestate. The probate court had jurisdiction to appoint the mother and it is a court of general jurisdiction and the appointment so made was valid until attacked in a direct proceeding and can not be considered as void in a collateral attack. On her resignation and the appointment of a new administrator the proceedings were maintainable by substituting the name of the new administrator, and the one-year statute of limitations would not bar the prosecution of the case by the new administrator as it was not in fact or in effect a new action.

Salyer v. Consolidated Coal Co., 246 Federal 74, p. 795.

DECLARATIONS OF DECEASED—PROOF.

In an action for the wrongful death of a miner the declarations of the deceased made 30 minutes after the accident to associate miners as to how the accident happened were but expressions of opinion as to the cause and consequence of the accident and were the narrative of a past event and consequently no part of the *res gestæ* and were improper.

Moreno v. New Guadalupe Mining Co. (Cal. App.), 170 Pacific 1088, p. 1089.

PHYSICIAN AND PATIENT—PRIVILEGE WAIVED.

In an action for the wrongful death of a miner where the administratrix and her witnesses testified fully and freely as to the nature of the injuries and gave publicity to all that ailed the decedent, this is sufficient to break the seal of privacy privileged by the statute. When a plaintiff makes voluntary exploitation of the decedent's injuries and the claimed cause of his death an inquiry into the symptoms exhibited by the deceased and the cause of his death thus initiated by the plaintiff can legitimately be brought to a close only by the testimony of the attending physician concerning the same subject matter, and the privilege created by the statute is thereby waived.

Moreno v. New Guadalupe Mining Co. (Cal. App.), 170 Pacific 1088, p. 1092.

LIENS.

EXTENT.

The statute of Missouri (sec. 8436, R. S. 1909) gives a miner a lien for his wages against the owner's mine and the property connected with its operation. A miner's lien is to be enforced upon the terms and procedure for enforcing mechanic's liens.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130.

ASSIGNMENT OF CLAIMS—SEPARATE LIENS.

The claims and accounts of laborers in a coal mine of a coal mine operator assigned to one and the same person remain separate, each depending on its own merit and liable to whatever defense there may be to it either as a demand or to its right of enforcement by lien. But all such claims may be joined in one suit by the assignee, but he must file a separate lien for each, since each has its distinct contract to support it and each has its distinct time of accrual to govern the limited time when a lien for its enforcement must be filed.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130.

SEPARATE CONTRACTS NOT MINGLED.

Materials furnished under distinct contracts can not be mingled in one account and a lien obtained for the aggregate. This rule applies to miners' liens.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130, p. 1131.

LABORER'S ACCOUNTS—SEPARATE LIENS.

The accounts and claims of laborers in a coal mine for services rendered under distinct contracts are separate and distinct liens, particularly where the contracts were with different persons. The papers or notices for such liens must be separately filed with the circuit court within the period of limitations for each.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130, p. 1131.

ASSIGNEE OF MINER'S LIEN—ENFORCEMENT.

The assignee of a mechanic's lien may bring suit in his own name and enforce such assigned lien as fully as if the claim had been filed by the original claimant. The holder or the assignee of a miner's lien is given the right to enforce his lien upon the terms and procedure for enforcing mechanic's liens.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130.

SEPARATE LIENS—ENFORCEMENT.

An assignee of the separate accounts of laborers and miners working in a mine can not file the papers in the clerk's office as a single lien and enforce the separate and distinct accounts in an action as a single lien.

Berry v. Rombauer Coal Co. (Mo. App.), 198 Southwestern 1130, p. 1131.

MINES AND MINING OPERATIONS.

RELATION OF MASTER AND SERVANT.

WHAT CONSTITUTES.

A teamster engaged in hauling coal with his own wagon and team from a mine, and who paid the regular mine price for the coal received by him and made his profit or compensation by the difference in the price paid at the mine and the price received on resale by him, was not, while so engaged in hauling coal, the servant or employee of the mine operator.

Sugar Valley Coal Co. v. Drake (Ind. App.), 117 *Northeastern* 937, p. 938..

STATUS—PLEADING.

A complaint in an action for damages for the death of a miner is insufficient if it fails to set up the relation between the intestate and the mine operator and fails to show that the intestate had a right to be in the mine at the time of his death or that fails to show the duty owing such intestate by the mine operator. It is not sufficient to aver that the deceased was in the service or employment of the mine operator in or about the business of mining, and while the deceased was in the operator's mine "in or about said business as aforesaid," a fire broke out and that the intestate was burned is not sufficient to charge that he was in the mine in the service or employment of the mine operator.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 *Southern* 547, p. 550.

RELATION AND LIABILITY—QUESTION OF FACT.

A workmen assisting in cleaning out a gas well was killed by the fall of a derrick. The company cleaning out the well was employed by an oil and gas company to clean the gas wells on the operator's property and that belonged to the gas company and which furnished gas to the company engaged in cleaning out the wells for the operation of its business. There was some evidence to show that the foreman or manager of the company controlling the operations had not employed the deceased workman to assist in cleaning the particular well. There was evidence to show that the employees of the company operating, for some time prior thereto, had been in the habit of ren-

dering assistance in connection with the wells of the oil company, and that this was done with the knowledge and consent of the company cleaning the wells. Under such state of the evidence it was a question of fact to be determined by the jury whether the deceased workman was an employee of the company cleaning the wells and not the employee of the oil company.

Brown v. Kittanning Clay Products Co. (Pennsylvania), 102 Atlantic 948.

ACTIONS—PLEADING AND PROOF OF NEGLIGENCE.

PLEADING NEGLIGENCE—GENERAL AVERMENTS.

Ordinarily in pleading negligence a general averment in the description of the defect may be sufficient, but the rule can not be extended as to generality of defects; and in an action for damages for the death of a minor caused by an explosion of gas in a mine, an averment "that a portion of defendant's mine was defective" is insufficient as a charge of negligence.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 550.

ELEMENTS OF NEGLIGENCE—PLEADING AND PROOF.

A complaint by a miner for injuries caused by the alleged negligence of the mine operator must by averment show: (1) That the mine operator was under legal duty to protect the complainant from the injury of which he complains; (2) that the operator failed to perform such duty; (3) that the injury complained of was proximately caused by the operator's negligence. These elements combined constitute the cause of action, and if the complaint fails to disclose the presence of all of them it is insufficient as a question of pleading to entitle the complainant to recover. Under such a complaint the proof must correspond with the allegations, and unless it establishes them in their general scope and meaning the cause of action is not made out. The evidence to support the allegation may be either direct or circumstantial, but it must be sufficient to show *prima facie* that all the elements constituting the cause of action were present. Where in such a case the evidence fails to show that the mine operator omitted any precaution that ordinary care and diligence would have suggested as necessary to render the stope in which the complainant worked reasonably safe for him while engaged in doing the work assigned to him, proof merely that the injured miner was in the employ of the mine operator and that he was injured by a fall of rock while working in a stope establishes no liability on the part of the mine operator.

Barry v. Badger (Montana), 169 Pacific 34, p. 36.

PLEADING AND PROOF OF NEGLIGENCE.

A general charge of negligence in an action against a mine operator is sufficient where the right of recovery is based on the gross negligence of a fellow servant, as the allegation of negligence includes gross as well as ordinary negligence.

Borderland Coal Co. v. Edwards (Kentucky), 100 Southwestern 792, p. 793.

The operator of a drilling machine in a mine, injured by a fall of rock from the roof outside of the place he was required to inspect and keep safe, charged in an action for damages that the mine operator failed to properly timber a certain stope in the mine, that he negligently omitted to inspect the roof, sides, and back of such stope; that he negligently failed to "pick down" the loose rock and earth from the roof and sides of the stope; that he negligently gave assurance to the injured miner that the stope was in a safe condition. A plaintiff in such an action is entitled to have the case submitted to the jury upon the acts of negligence of which he produced evidence. It was not necessary for him to establish every act of negligence charged, whether of commission or omission, but it was sufficient if he established one or more of them by a fair preponderance of the evidence.

Urich v. Utah Apex Mining Co. (Utah), 169 Pacific 263, p. 264.

ALLEGATIONS OF NEGLIGENCE NOT INCONSISTENT.

In an action for damages for the death of a helper in a drilling crew while removing a pipe or drill stem from an oil well that was being drilled, caused by the breaking of a steel hook and striking the helper on the head and resulting in his death, the allegations of negligence were to the effect: (1) That the hook was not large enough or strong enough and was not intended to withstand the strain to which it was put; (2) that the drilling company neglected to make the necessary inspection to observe signs of breaking; (3) that the foreman in charge of the work handled the apparatus carelessly and in such a manner as to subject the hook to sudden jerks. These allegations of negligence are not subject to the charge of being inconsistent as no one of the allegations contradicts another.

Haynes v. Fisher Oil Co., 142 Louisiana, 77 Southern 781, p. 782.

INSUFFICIENT CHARGE OF NEGLIGENCE.

In a complaint and petition by a miner injured while assisting in the operation of an electrical mining machine it was averred, as a preliminary statement, that the mine operator negligently employed an inexperienced jack setter in the place of the regular and experi-

enced jack setter. But the petition and complaint in the part stating the particular acts of negligence failed to include the alleged negligence of employing an inexperienced jack setter, but stated other acts of negligence as causing the injuries complained of. This preliminary ground of negligence is therefore beyond the issues made by the pleadings and is not to be considered and is without weight as an element in the case.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1073.

EVIDENCE INSUFFICIENT TO SHOW NEGLIGENCE.

A coal-mine operator employed in the operation of an electrical coal-cutting machine, a machine boss, a machine operator, a jack setter, and two shovelers. It was the duty of the shovelers to shovel behind the machine and to take down the jack attached to iron rails on which the machine ran and to uncouple the rails so that they could be replaced in front of the machine and to remove and clear away dirt and other materials from under the layers of coal. It was the duty of the jack setter to see that the roof of the mine where the machine worked was in a reasonably safe condition, and if not to notify the machine operator and have the roof made safe. The mine operator is not to be charged with negligence and made liable for injuries to one of the shovelers caused by a fall of slate from the roof on the alleged ground of negligence in failing to furnish the shoveler a safe place, where the evidence is conflicting as to the duty of the jack setter to inspect the roof, and where the evidence shows that the roof at the time and place where the jack was set appeared to be safe and solid, and that the operations of the heavy machine might jar and loosen the roof, and where it appeared that the injury was caused by a fall of slate after the jack was removed by the jack setter, and where it appeared that the method of operating and the men employed in connection with the operation of the mining machine were usual and customary and regarded as sufficient and safe by the mine operator and by the miners in the operation of the cutting machine.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1074.

PROOF OF SUBSEQUENT REPAIRS NOT ADMISSIBLE TO PROVE NEGLIGENCE.

In an action for the wrongful death of a miner the proof showed that he was working as a mucker in the entry through which there was suspended a live trolley wire, and that his death was caused by coming in contact with this wire. Proof was admitted on repeated questions of the plaintiff's counsel as to certain repairs made in the entry after the accident. It is a settled doctrine that in actions for

injuries alleged to have been caused by defective machinery or appliances or places of work, proof of subsequent alterations or repairs has no legitimate tendency to prove negligence at the time of the accident and is calculated to prejudice the defendant, and it is error to admit such proof.

Bingham Mines Co. v. Bianco, 246 Federal 936, p. 937.

REJECTION OF WORKMEN'S COMPENSATION ACT—PROOF OF NEGLIGENCE ESSENTIAL.

In an action by a miner for damages for injuries occasioned by the alleged negligence of a mining corporation, the burden is on the injured miner to establish the negligence on the part of the mining corporation, where it has elected not to accept the provisions of the Illinois workmen's compensation act.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

STATEMENTS OF INJURED PERSON—RES GESTAE.

The statements of an injured person as to the object that struck him are admissible in evidence in an action for damages for the injury and resulting death, as part of the *res gestae*, where it appears that such statements are spontaneous and sincere responses to the actual sensations and perceptions already produced by the external shock from the blow.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 33.

ACTION BY INJURED PERSON—EXPLANATION BY WITNESS—RES GESTAE.

A person employed to do certain work for an oil company was, while passing over a small gas main, struck and injured by reason of a break in the pipe and the sudden recoil of the pipe due to the great pressure of the gas. The blow rendered him unconscious, but on regaining consciousness and in response to a question as to what hurt him he pointed to the pipe line and said: "That hurt me! It struck me in the back." The actions of the injured person in pointing out an object which he claimed struck him are proper to be shown by the witness to whom he made the statements that are themselves admissible in evidence, where such actions tend to illustrate and make such statements intelligent.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 33.

PARTY'S RIGHT TO HAVE CASE SUBMITTED UPON ISSUES PLEADED.

In an action by a miner for damages for the loss of the sight of an eye caused by a splinter of steel flying from an alleged defective

hammer wielded by another employee, the plaintiff is entitled to have his case submitted upon the issues pleaded and presented, and to have such issues stated by way of instructions of the court free from commingling with injected issues not pleaded or presented and which may have caused an adverse verdict.

Cavoretto v. Alaska Gastineau Mining Co., 245 Federal 853, 855.

NEGLIGENCE OF OPERATOR.

ACTIONABLE NEGLIGENCE—WHAT CONSTITUTES.

Negligence of a mine operator consists in the omission to do something which it was his duty to do, or the commission of some act which it was the duty of the mine operator not to commit, the commission or doing of which was the proximate cause of the injury.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

ACTIONABLE NEGLIGENCE—PLEADING—PRESUMPTION.

The mere pleading by an injured miner that he was in the employment of the defendant, a mine operator, who was operating a coal mine and that he was injured and that the injury arose out of and in the course of the employment, and that the operator had elected to reject the provisions of the workmen's compensation act, ordinarily would not be sufficient upon which to base an action for negligence. But the workmen's compensation act of Iowa expressly provides that where a mine operator has elected to reject the provisions of the act it shall be presumed that an injury to an employee was the direct result and growing out of the negligence of the employer, and that such negligence was the proximate cause of the injury.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 392.

ELEMENTS OF ACTIONABLE NEGLIGENCE.

In an action by a miner for personal injuries caused by the alleged negligence of the mine operator the elements constituting actionable negligence are: The existence of a duty on the part of the operator to protect the miner; the breach of that duty by the operator; and an injury to the miner proximately resulting therefrom. When any one of these three essential elements are wanting in a complaint or petition then such complaint or petition does not state a cause of action.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 48.

VIOLATION OF DUTY.

Negligence presupposes a duty, and if there is no duty to do a thing, there can be no liability predicated on a failure to do it. It

is the duty of a mine operator to timber that part of a room that a miner has worked out and in which the operator has placed tracks and runs cars for hauling out the coal mined. The failure to properly timber or prop this part of the room by reason of which the miner working in the room was injured is actionable negligence and renders the mine operator liable.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 107.

WANT OF NEGLIGENCE—MATTER OF LAW.

A car driver in an action for damages for injuries caused by being caught between the car and the side of the entry, charged the mine operator with negligence in failing to maintain a sufficient space between the car and the entry and in furnishing the driver with vicious and unruly mules to drive to the car. On the trial of the case the court may as a matter of law determine that neither the nearness of the mine wall to the track nor the speed at which the mules were going was the proximate cause of the miner's injuries.

Mayhan Jellico Coal Co. v. Bird (Kentucky), 201 Southwestern 306, p. 307.

UNSAFE CONDITION MADE IN PROGRESS OF WORK.

A mine operator is not to be charged with negligence in permitting the mine roof in an entry where the miner worked to be unsafe and dangerous, and that it was the duty of the operator to have properly propped and capped and braced the roof at that place, where the only reasonable inference from the proof is that the unsafe condition which resulted in the injuries complained of developed in the progress and as a result of the miner's work, of which he alone knew or had the opportunity to know.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 922.

CONCURRENT NEGLIGENCE OF OPERATOR AND FELLOW SERVANT.

A mine operator may be negligent in furnishing a miner with a defective and unguarded insulator attached to a live wire, and in directing the miner to hold the insulator while other employees attached the wire to another pole; and the fact that the employees who were attaching the wire to the pole were negligent in jerking the wire, so that the miner's hand came in contact with the live wire, will not prevent a recovery against the mine operator. If the injury was due to the concurrent negligence of the mine operator and the fellow employees, the operator is liable.

Elk Horn Mining Corp. v. Pitts (Kentucky), 201 Southwestern 9.

INJURY TO TIMBERMAN—LIABILITY.

A miner was injured by a fall of rock or slate from the roof of a mine while in the act of timbering an unsafe place. The miner was

a member of the timber crew whose duty it was to perform such service. He was carrying a prop for the purpose of placing it under the roof, and while in the act of laying it down for the purpose of resetting, a piece of slate fell from the roof and injured him. The negligence relied upon in the action to recover damages was the failure of the mine operator to furnish him a reasonably safe place for work. He alleged in his complaint that while he was intending to prop the roof of the mine and place caps thereon to make the same safe, the mine operator permitted the mine roof to become unsafe, dangerous, and defective, and by reason of the operator's failure to use ordinary care for his safety the slate or rock fell and injured him. Under such circumstances the mine operator can not be charged with actionable negligence. The rule requiring an operator to furnish a safe place for a miner does not apply where the miner is employed himself to make the dangerous place safe.

Charles v. Elk Horn Mining Co. (Kentucky), 200 Southwestern 461.

FAILURE TO PREVENT MINER FROM USING IRON TAMPING BAR.

In an action by a miner injured by an explosion of a powder cartridge, the negligence charged as the basis of the action was that the operator permitted and did not prevent the injured miner from using an iron or steel tamping bar without a copper or other soft metal head. The miner was certified under the Pennsylvania statute and was not only a proper person, but the only kind of a person lawfully authorized to do the work he was doing. The theory of the action was that the steel tamper must have struck "sulphur", thereby producing a spark which ignited the cartridge and caused the explosion, and this train of circumstances happened in a damp hole and had never before happened to the knowledge of the injured miner. The Pennsylvania mining act (act of June 2, 1891, P. L. 192) expressly provides that in charging holes for blasting in slate or rock in a mine no iron or steel-pointed needles shall be used. But this prohibition applies to a tight cartridge and as the cartridge causing the injury was not tight the rule is inapplicable and the negligence of the operator could not be predicated on his permitting or his failure to prohibit the violation of a rule or law where it had no application.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 434.

VENTILATION—IMPROPER SYSTEM—ERRONEOUS INSTRUCTIONS.

A complaint in an action for damages for the death of a miner caused by an explosion of gas charged that the mine operator maintained a defective or improper system of ventilation, and there was

evidence from which the jury could infer negligence on account of the system used by the mine operator in ventilating the mine. Under these circumstances it was error for the court to charge the jury that it would not be authorized to find the defendant guilty of negligence because of and on account of the system used by the defendant in its mine of employing brushers to examine for and brush out gas in the mine.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

PERMITTING UNCOVERED HOLE IN MINE CAR TRACK.

In an action by a miner for damages for injuries caused by stepping into an unguarded hole between the tracks where he was required to push cars of loaded coal, it was sufficient on the plaintiff's part to show the negligence charged in allowing such an uncovered hole to be in the path of the miner whose task was to push loaded cars over it. It was no part of his case to show it to be exceptional, or out of the usual custom in the operation of coal mines. But it is proper for the defendant in defending against such a charge of negligence to show that it was the custom to maintain such hole in the condition described whether from necessity or otherwise.

Clark v. Butler Junction Coal Co. (Pennsylvania), 102 Atlantic 952, p. 954.

DEFECTIVE PIPE LINE—INJURY TO CHILDREN—LIABILITY.

A corporation transporting natural gas by means of a pipe line negligently permitted a leak to exist in the line upon land and at a place having the appearance of and that was commonly used as a public highway in a settled community. Young children, including a boy and girl each about 6 years of age, were attracted by the escaping gas and played with it in various ways. The boy, at the request of the girl, lit the gas and the girl was badly burned. In an action for damages for the injuries sustained by the girl the natural gas company can not claim that the boy by thus intervening can shift the blame for the accident from the company to himself any more than can the injured girl, and neither of them being legally responsible or capable of appreciating the probable consequences of yielding to the temptation held out to them through the negligence of the company, that negligence must be regarded as the proximate cause of the accident and the responsibility for the consequences rests upon the gas company as the creator of the condition which suggested the act to the immature minds of the children and at the same time made its performance a source of danger to them.

Jackson v. Texas Co., 143 Louisiana, 78 Southern 137, p. 139.

DUTY OF OPERATOR TO FURNISH SAFE PLACE.**LIABILITY FOR FAILURE TO FURNISH SAFE PLACE.**

The operator of a drilling machine in a mine was required to inspect and keep safe that particular part of the mine in which he worked, but as to all other parts of the mine it was the duty of the mine operator to use reasonable care to inspect and keep safe and keep free from loose and falling rock the roof in the other parts of the mine; and any failure in the discharge of this duty resulting in an injury to the operator of the drilling machine renders him liable.

Ulrich v. Utah Apex Mining Co. (Utah), 169 Pacific 263, p. 264.

EXERCISE OF CARE.

A mine operator, like other employers, is required to exercise reasonable care in furnishing his miners a safe working place. But a mine operator is not an insurer of the safety of the miners employed, and there must be a failure to exercise the proper degree of care in order to create a liability on the part of a mine operator.

Barry v. Badger (Montana), 169 Pacific 34, p. 36.

FAILURE TO EXERCISE CARE NECESSARY TO LIABILITY.

A miner while engaged in drifting along a vein was injured by a fall of rock from an overhang in the stope above. The miner had had 25 years' experience in mines and was familiar with the formation in the mine in which he worked, and had worked in stopes where no timbering was necessary and such places were considered safe. The particular stope in which he was working was apparently not different from others in which he had worked and there was nothing unusual showing that it needed timbering. Some loose rock in the wall above had previously been removed and all that was believed to be dangerous was pried down, and back of this the wall appeared to be solid. The injured miner, and another experienced miner, had worked for several days in the stope, had examined the walls, including the overhang, and one had assisted in removing the only loose or dangerous rock discovered in the stope, and after this was removed the walls, to these experienced miners, seemed sufficiently safe. There was nothing to show that the mine operator had not exercised reasonable care to make safe the stope in which the miner was working at the time of his injury, and the facts and circumstances were not sufficient to create a liability on the part of the mine operator for a breach of his duty in providing a safe place.

Barry v. Badger (Montana), 169 Pacific 34, p. 35.

EXERCISE OF CARE—EXCEPTION TO THE RULE.

The rule that a mine operator must exercise ordinary care to provide his miner a reasonably safe place for work does not apply where the very work the miner is employed to do consists in making a dangerous place safe.

Charles v. Elk Horn Mining Co. (Kentucky), 200 Southwestern 461.

OPERATOR NOT INSURER OF MINER'S SAFETY—ACCIDENT NOT EVIDENCE OF NEGLIGENCE.

A mine operator is not an insurer of the safety of the employees in his mine; neither does the happening of an accident by which a miner is injured during the course of his employment, standing alone, furnish the basis for an inference of culpable negligence on the part of the mine operator.

Barry v. Badger (Montana), 169 Pacific 34, p. 36.

NOTICE AND TIME TO REMEDY NECESSARY.

In order to make a coal mine operator liable for a failure to perform his duty in furnishing a safe place for a miner to work the evidence must bring home to the mine operator notice of the unsafe condition of the place in time to remedy it before the accident and the injury complained of.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1075.

NOTICE OF CHANGED CONDITIONS.

It is the duty of a mine operator to furnish the miners with a reasonably safe place in which to work; but where the operator has furnished a reasonably safe place, notice must be brought home to him of any changed conditions in the place, brought about by the work of the miners, before he can be held liable for failure to furnish a safe place.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1075.

PRESUMPTION OF PERFORMANCE OF DUTY.

In an action for damages by an injured miner on the ground of the failure of the mine operator to furnish the miner a safe working place, the coal mine operator is entitled to the benefit of the presumption that he has performed his duty in this respect until the contrary appears, and it devolves upon the injured miner in such case to show by the preponderance of the evidence that the mine operator failed to perform his duty in this respect in consequence of which the complaining miner received the injuries.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1074.

DANGERS ARISING IN PROGRESS OF WORK.

The law places upon a mine operator no duty to provide against dangers arising in the progress of a miner's work and resulting therefrom.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 922.

APPLICATION OF DOCTRINE.

The safe place doctrine may not be applicable where the miner is engaged in removing pillars in a coal mine, but it does apply where the miner was expressly ordered by the mine foreman to continue the work of pulling the stumps and robbing the pillars.

Consolidated Coal Co. v. Deskins (Kentucky), 199 Southwestern 779.

LEAVING UNEXPLODED CHARGE OF DYNAMITE.

Where an unexploded charge of dynamite was negligently left in a hole in the wall of an entry in a coal mine which was a miner's working place and where the foreman failed to direct the miner not to work therein, but permitted him to do so, and the miner while engaged in drilling a hole in the entry in pursuance of his duties was injured by the explosion of the unexploded charge of dynamite, the negligence of the mine operator in leaving the unexploded charge of dynamite and in directing and permitting the miner to work on at his working place under such circumstances was the proximate cause of the injuries resulting from an explosion of the charge of dynamite.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 50.

DUTY TO PROP ROOF—AGREEMENT BETWEEN OPERATOR AND MINER.

In an action for the death of a miner caused by the fall of rock or slate from the roof of his room, proof was made of an agreement between the operator and the miner to the effect that in case a room has been properly timbered and from any cause it becomes dangerous so as to require double timbering, the mine operator shall, when notified by the miner, do the necessary work to protect the roadway. The proof shows that the foreman failed on notice to do anything to protect the roadway from falling slate. The miner discovered cracks in the slate which suggested imminent danger. The danger was in a place over the roadway and where it was the operator's duty to make the repairs upon notice, as it was at and over where the workmen must pass in gaining ingress and egress from the working face of the mine. The miner had a right on the failure of the foreman to make the place safe, to put in timber support not only for his own

protection against the negligence of the operator, but for the protection of others who might come in over the roadway, as well as for the protection of the operator's property. Such circumstances are sufficient to render the operator liable for the death of the miner caused by a fall of slate from the roof at the time he attempted to repair the same.

Mitchell v. Swanwood Coal Co. (Iowa), 166 Northwestern 391, p. 396.

Erickson v. Maple Block Coal Co. (Iowa), 167 Northwestern 105, p. 106.

DUTY TO PROVIDE SAFE APPLIANCES.

DUTY TO FURNISH SAFE APPLIANCES—CONTINUOUS INSPECTION.

It is the duty of a mine operator to furnish safe and suitable machinery and appliances for the use of employees, and this duty is not discharged by merely furnishing suitable machinery and appliances in the beginning, but comprises also a continuous oversight and inspection to keep them so.

Northern Central Coal Co. v. Barrowman, 246 Federal 906, p. 909.

FURNISHING SAFE PLACE AND APPLIANCES.

A coal-mine operator owes his employee, a miner, the duty of furnishing a safe place in which to work and safe appliances with which to work.

Sloss-Sheffield Steel & Iron Co. v. Russell, 247 Federal 289, p. 291.

APPLIANCES NOT FURNISHED BY MINE OPERATOR—LIABILITY.

The rule charging a mine operator, under many circumstances, with the consequences of his miners using an unsafe contrivance does not apply where the appliance causing the injury was not furnished by the mine operator and who was not charged with the duty of providing the same.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 435.

MINER MAY ASSUME THE OPERATOR HAS DISCHARGED HIS DUTY.

An employee is under no obligation to search for dangers in the machinery or appliances with which he is working, but he has a right to assume that his employer has performed his primary duty with respect to the machinery and appliances.

Northern Central Coal Co. v. Barrowman, 246 Federal 906, p. 910.

EXCEPTIONS TO RULE—SIMPLE TOOL.

Ordinarily it is the duty of an employer to exercise reasonable care to provide reasonably safe tools and appliances for employees;

but this rule has many modifications, and one is that where the tool is simple and the place of employment free from danger, the employee of mature age and experience, in the handling of such simple tool may not look to the employer for instruction in the use thereof or to inspect the tool, nor can he have damages for injuries resulting from his own handling of such an implement.

Consolidated Coal & Coke Co. v. Music (Kentucky), 199 Southwestern 1074.

USE OF SIMPLE TOOL.

An ordinary ax is a simple tool governed by the simple tool rule which is to the effect that where the mode of operating an instrument is so simple that a person of ordinary intelligence can at once perceive the mode of operating it and he voluntarily holds and uses it in such a way as to receive an injury and there is no reason why he should so hold or so use it he can not recover damages for the injury although the tool is defective.

Consolidated Coal & Coke Co. v. Music (Kentucky), 199 Southwestern 1074.

USE OF UNSAFE APPLIANCES.

An employer, an oil drilling company, is responsible in damages for an injury to an employee in an accident resulting from the company's attempt to use an apparatus that is generally recognized by men of practical and expert knowledge to be of insufficient size or strength to withstand the strain to which the employer put it.

Haynes v. Fisher Oil Co., 142 Louisiana, 77 Southern 781.

UNSAFE HOOK TO DRAW PIPE LINE.

A corporation engaged in drilling oil wells was sued for the death of an employee who was a helper in a drilling crew removing pipe or drill stem from an oil well. A steel hook that connected the cable with the end of the pipe broke under the heavy strain and struck the helper on the head, resulting in his death. The evidence shows that the attempt to use such a small hook to extract a line of pipe of the length and weight that the foreman was attempting to lift when the hook broke was not only bad judgment on his part but was contrary to the ordinary and customary method of doing such work. The stem consisted of 1,800 feet of 4-inch pipe and 41 feet of 6-inch pipe. The proof shows that it generally is considered dangerous to attempt to lift more than 1,200 or 1,500 feet of 4-inch pipe with a hook the size of the one that broke and caused the injury. A larger hook was present at the derrick intended to be used for such heavy work as was being performed when the accident happened, but the smaller hook was used because it could be handled

more conveniently and faster. The evidence was sufficient to sustain the charge of negligence in the use of an appliance of insufficient size or strength to withstand the strain to which it was put.

Haynes v. Fisher Oil Co., 142 Louisiana, 77 Southern 781.

ELECTRICAL APPLIANCES.

MAINTAINING UNINSULATED WIRES.

A mine operator maintaining a substation by which electricity is turned into his mine for its operation from a central electrical plant is not to be charged with negligence for maintaining uninsulated wires carrying 22,000 volts of electricity and is not liable for the death of a laborer employed in such substation whose duty it was to operate the switches by means of wooden poles some 6 feet in length attended with no danger, and who while acting outside of the scope of his duties and in violation of an express order and while on a ladder some 12 feet high was killed by coming in contact with the electrical wires.

Caulkins v. Wyoming Coal Mining Co. (Wyoming), 171 Pacific 265, p. 266.

UNGUARDED INSULATOR—DEGREE OF CARE.

A miner was injured by an electric current while assisting other employees in extending a trolley wire. The mine foreman handed an insulator to him to hold the wire until the other employees could tighten the wire to the next pole some 25 feet distant. The employees assisting jerked the wire and the miner's hand slipped and came in contact with the live wire attached to the end of the insulator. In attaching and tightening the wire it was likely to be pulled or jerked, and if the insulator was not guarded even a slight jerk might be sufficient to cause the hand of the miner to slip and come in contact with the live wire. In view of the dangerous instrumentality which the miner was required to handle, and the fact that the insulator was not protected by guards, or the current not released from the live wire is sufficient to make the mine operator's negligence a question of fact and for the jury to determine whether the operator used the utmost degree of care to provide the miner with safe appliance for work.

Elk Horn Mining Corp. v. Pitts (Kentucky), 201 Southwestern 9.

LIABILITY FOR DEATH OF ELECTRICIAN.

An electrician employed in a coal mine where electricity was used for hoisting and lowering cages was killed while working in a shaft repairing the electrical appliances by the sudden dropping of a cage. The evidence justified a finding that the accident was caused by the

negligent use of insufficient brake shoes that had been allowed to wear down from the original thickness of about four inches to an inch or less in places, and that the wear was too great to be taken up by the turnbuckle and that this defect in the brake shoe caused the cage to fall, and where reliance was had wholly on the setting of the lever and brake.

Northern Central Coal Co. v. Barrowman, 246 Federal 906, p. 909.

OPERATOR'S ASSURANCE OF SAFETY.

RELIANCE BY MINERS.

It was a custom at certain mines for laborers to remove the slate from the places where they were loading coal. Such a custom, if it existed, might be waived by the superior officers in charge of the mine and it was waived by the mine boss assuring the laborer that the place was safe. The rule applies especially where the laborers had never worked in the mine before and was wholly unfamiliar with the conditions and formations. Under such circumstances they had a right to rely upon the assurance given them by the mine boss.

Carter Coal Co., v. Filipeck (Kentucky), 201 Southwestern, 468, p. 469.

An employee or miner has a right to rely on the superior knowledge of the employer or his foreman and it is only in cases where the danger is so imminent that no ordinarily prudent man would undertake the work regardless of what the employer or foreman said about it that he is barred on account of contributory negligence.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

Consolidated Coal Co. v. Deskins (Kentucky), 199 Southwestern 779.

EMPLOYEE'S KNOWLEDGE OF DEFECTS—EMPLOYER'S ASSURANCE OF SAFETY.

An employee called the foreman's attention to a defect in the appliance that he was using. The foreman by saying that he guessed it was safe and by ordering the employee to continue the use of the appliance could be construed by the employee, whose duty it was to obey his employer, as nothing less than an assurance that his fear of danger was ill-founded and that he could safely proceed with the work.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

CONDITION OF PREMISES—USE BY INVITEE.

A pipe-line company transporting gas in its line was invited by an oil company to use a private road or way owned and used by the oil company. The invitation by the oil company to the pipe-line company extended to its agents and employees where the oil company

directed an employee to procure for it certain materials to be hauled and transported over the way. Under such circumstances the rule that one who invites another to come on his premises for a lawful purpose is liable to such invitee for any injury he may receive by reason of the unsafe condition of the premises applies and renders liable the oil company for an injury to an employee of the pipe-line company caused by the breaking of a pipe due to the high pressure of the gas. The invitation implied that the premises would be reasonably safe, at least for the purpose of obtaining and removing the materials, and the person employed and injured had a right to consider that the road would be reasonably safe for travel.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 34.

EMPLOYER'S KNOWLEDGE OF DEFECTS—TIME FOR REPAIR—APPLICATION OF RULE.

The rule that an employer, on learning of the defects of an appliance, must have time to repair the defects does not apply where an employee called the attention of the foreman to the defect and where the foreman assured the employee that the appliance was safe and ordered him to continue its use.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

OPERATOR'S PROMISE TO REPAIR.

PROMISE TO REMOVE CAUSE OF DANGER.

The rule that a miner does not assume the risks resulting from the operator's negligence, if known to him, does not apply, and the operator is not relieved from liability where the miner continues in the employment, though subject to extraordinary risks caused by the mine operator's negligence, where the operator promised that the cause of such extraordinary risk will be removed.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

DUTY TO WARN OR INSTRUCT.

COMPETENCY OF EMPLOYEE—WARNING EXCUSED.

A mine operator has a right to rely upon a certified miner's knowledge of the method and the danger of charging and firing blast holes in a mine where the certified miner owned his own tools, had fired thousands of blasts before the accident, and was familiar with the danger of tamping a cartridge with a steel tamping bar and where the accident that caused the injury was an unusual and, in fact, an unheard of accident. Under such circumstances a mine operator can

not be charged with negligence for failing to instruct or warn the miner, as the particular accident could not have been warned against because no one had ever heard of such a thing happening. Negligence of a mine operator can not be predicated on lack of a warning to a miner as to a particular matter that has never come within either the experience or observation of a mine operator or of a miner.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 435.

INCOMPETENCY OF MINER—PRESUMPTION OF LAW.

In an action for damages for the death of a miner caused by an explosion produced by the miner attempting to light a safety lamp it was error for the court to instruct the jury to the effect that the presumption of law in such a case is that the miner, at the time he accepted employment as a brusher was a competent person to fill such a position, where there was evidence tending to show that the miner was not a competent brusher at the time he accepted employment and that the mine foreman knew this fact and was having him coached under the directions of another employee.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

SKILLED EMPLOYEE PRESUMED TO KNOW DANGERS.

An employee who holds himself out as skilled in a trade and thereby procures employment can not hold his employer liable for failure to instruct him in a matter he must be assumed to know in order to successfully pursue that trade. This rule is applied to a certified miner under the Pennsylvania mining act who was given a certificate as qualified to be a miner in any anthracite coal mine in the State and who was employed by the mine operator to charge and fire holes for blasting in the mine.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 435.

CERTIFICATE OF COMPETENCY—EFFECT ON DUTY TO WARN.

A miner, a foreigner only a short time in this country and unable to speak the English language, obtained a certificate from the Miners' Examining Board of Illinois that he had given satisfactory evidence that he had worked in coal mines at the face for not less than two years and was thereby authorized to seek and accept employment as a coal miner. He was not a short firer and had never used explosives in mining operations. In an action by such miner for damages for injuries occasioned by an explosion of powder used in mining, under a charge of common-law negligence, his certificate

of competency received from the miners' examining board was proper evidence on the question as to whether the mine operator knew or would have known by the use of ordinary care, that a miner holding such a certificate was ignorant as to the use of explosives and required instruction and warning in the proper manner of doing his work.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

PROOF OF CUSTOM NOT TO INSTRUCT CERTIFIED MINERS.

In an action by a miner for damages for injuries caused by an explosion of powder at the face of the coal where the miner was working, under a charge of common-law negligence, the negligence of the mine operator in failing to warn or instruct the injured miner, who was a certified miner under the statute of Illinois, it was proper for the mine operator to prove a custom in the mine and in the mines in the mining district and in the county and the adjoining counties to the effect that at no time were practical, certified miners instructed in reference to the manner in which he should place, load, drill, tamp, and fire shots at his working place in the mine, nor was a certified miner instructed how to place his shots, drill his hole, make his cartridge, tamp the cartridge, place the fuse or squib, and light and fire the same. If the custom was general, uniform, and well known not to give further instructions to a certified miner, the custom was not obviously unreasonable or dangerous.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

DANGERS READILY OBSERVABLE.

An employer is not bound to warn an employee of dangers so patent as to be readily observed by the reasonable use of the senses, considering the age, intelligence, and experience of the observer.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 434.

UNEXPLODED SHOTS—WARNING.

It is the duty of a mine operator to warn or instruct newly employed or inexperienced miners of the danger of injury from unexploded shots remaining in the coal and which it was the duty of an inexperienced miner to take out and especially where the mine operator had knowledge of the danger and had adopted a stringent rule in reference thereto prohibiting the miners from working where there was an unexploded shot.

Jellick v. Jamison Coal & Coke Co. (Pennsylvania), 103 Atlantic 300, p. 301.

DUTY AS TO UNEXPLODED SHOTS.**DEGREE OF CARE REQUIRED.**

A charge of dynamite or other explosive placed in the coal and fired by the use of an electric battery seldom fails to explode, but when one does misfire, the miner is not expected or permitted to deal with the situation, but is required to report the circumstances and the matter is then turned over to one skilled in the use of explosives. It is the duty of a mine operator on directing a miner to pick down the coal following a shot to warn or instruct him as to the danger, and to inform him of a rule of the operator made for his protection.

Jellick v. Jamison Coal & Coke Co. (Pennsylvania), 103 Atlantic 300, p. 301.

UNEXPLODED SHOTS—SAFE PLACE.

A miner while sinking a shaft was injured by an explosion of dynamite in a misfire hole resulting from the failure of a prior shift of miners to explode all the charges of dynamite placed in the drill holes. If the shaft was not a reasonably safe place at the time the miner was injured it was because of the misfire hole; and it was a reasonably safe place to work unless such misfire hole resulted from the use of an improper fuse. If a proper fuse was used and there yet occurred a misfire that rendered the shaft less safe, such increased unsafety would be merely an incident to a properly conducted mining business and the shaft would still be a reasonably safe one. Whether or not a place in which miners are required to work is a reasonably safe one depends not upon its actual freedom from danger but upon whether the mine operator has used all proper precautions looking to making and keeping such place as safe as the nature of the business will reasonably permit.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147.

DUTY OF OPERATOR TO WARN OR INSTRUCT MINERS.

A mine operator carrying on a business involving danger to his employees and with knowledge of the possibility of special danger from unexploded shots, adopted a special rule for the conduct of miners to guard them against injury from that source. The operator was therefore bound to instruct the miners clearly and unequivocally with respect to that danger and as to the means of avoiding it. The stringency of the rule adopted for the guidance of the miners in dealing with unexploded charges when they were discovered shows that the mine operator fully appreciated the fact of possible danger from that cause.

Jellick v. Jamison Coal & Coke Co. (Pennsylvania), 103 Atlantic 300, p. 301.

BLASTING—USING POOR FUSES—INCREASED RISK—BURDEN OF PROOF.

A miner assisting in sinking a shaft was injured by the explosion of a charge of dynamite remaining in a misfire hole that resulted from the failure of a prior shift of miners to explode all the charges of dynamite in the drill holes. The negligence charged consisted in the use of a poor or defective fuse. If an improper fuse was furnished to the former shift and used when attempting to fire the charge and if the misfiring of the charge was traceable to the use of the improper fuse, then the burden was on the mine operator to show that he was not guilty of negligence under the rule that when an employer negligently increases a known risk and an injury occurs the burden rests upon the mine operator to show that the injury did not occur because of that which increased the risk.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147.

RULES—ADOPTION AND PROMULGATION.**MINER'S KNOWLEDGE OF RULES—PRESUMPTION.**

When rules are adopted, approved, and posted by a mine operator as required by the statute, the miners are deemed to have notice of and to have agreed to the same; and a miner can not complain that he had no notice or knowledge of a rule where he failed to request that it be furnished him.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 923.

VIOLATION OF RULE BY MINER.

A miner who violates a rule adopted and posted by the mine operator as required by the statute can not recover for injuries occasioned by such violation.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 923.

DUTY TO INFORM MINER OF RULE.

It is the duty of a mine operator who has adopted a stringent rule in reference to miners working about unexploded shots to inform a newly employed and inexperienced miner fully of the rule and its requirements and of the danger of the work where shots remained.

Jellick v. Jamison Coal & Coke Co. (Pennsylvania), 103 Atlantic 300, p. 301.

PROOF OF EXISTENCE OF RULES.

A mine operator can not be charged with negligence and held liable for injuries to a miner caused by the premature explosion of a blast on the ground that the mine operator had failed to post rules and

regulations as required by the statute, where the injury complained of was not the proximate result of the violation of any rule and where the injured miner testified that he had never seen the rules posted and where other uncontradicted evidence showed that rules were in fact posted in various places.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 435.

DELEGATION OF DUTY.

LIABILITY FOR NEGLIGENCE.

Where a mine operator instead of personally performing the duties imposed upon him as employer engages another to perform these duties for him, he is liable for the negligence of such person so engaged. The negligence of the person thus acting is not the negligence of a fellow servant, no matter what his position as to other matters is, but is the negligence of the mine operator to do those things which it is his duty to perform.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 474.

NEGLECT OF FOREMAN OR OFFICER.

NEGLIGENT ORDER.

A foreman's negligence, sufficient to make the mine operator liable, may consist in negligently ordering an employee to continue the use of a defective appliance.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.
Consolidated Coal Co. v. Deskins (Kentucky), 199 Southwestern 799.

LIABILITY OF OPERATOR FOR NEGLIGENCE.

A mine operator who delegates to older and experienced employees the duty of instructing and qualifying the inexperienced miners for service, is liable for the negligence or omission of any such instructor if, by reason of it, the employee or miner suffers injury.

Jellick v. Jamison Coal & Coke Co. (Pennsylvania), 103 Atlantic 300, p. 301.

NEGLECT OF FELLOW SERVANT.

GROSS NEGLIGENCE AND WILLFUL ACT.

In an action by a miner for damages caused by the alleged gross negligence of a fellow servant, it is error for a court in its instructions to the jury to make the mine operator's liability depend upon willful rather than gross negligence of the fellow servant.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

GROSS NEGLIGENCE OF SUPERIOR FELLOW SERVANT.

Under the rule as applied in Kentucky a miner may recover from the mine operator damages for injuries caused by the gross negligence of a fellow servant; and particularly so where the fellow servant is superior and is authorized to give orders to the miner.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

NEGLECTANCE OF MOTORMAN—LIABILITY OF OPERATOR.

A coal mine operator may be liable for the negligence of a motorman in running and operating the motor in such a careless and negligent manner and with such rapidity in backing out of a siding with the trolley pole in front of the motor that caused the wheel to jump from the wire at the fork, the pole to strike against the roof of the entry, breaking it and causing an injury to the brakeman on the motor by coming in contact with the live wire.

Borderland Coal Co. v. Miller (Kentucky), 201 Southwestern 299, p. 301.

MINER'S WORKING PLACE—SAFE PLACE.

DUTY OF MINER TO KEEP SAFE.

A mine operator is not subject to the charge of negligence and consequent liability for the death of a miner caused by an explosion of gas in a room where the miner himself was employed for the purpose of brushing the gas out of the room and where he was competent to perform that duty.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

MINER MAKING WORKING PLACE.

The common law rule that requires a master to exercise ordinary care to provide his servant a reasonably safe place in which to work does not apply in cases in which the very work the servant is employed to do is of such a nature that its progress results in constant changes in the condition of the place affecting its safety.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

MINER MAKING WORKING PLACE SAFE.

A mine operator must timber his mine and use ordinary care to keep it reasonably safe for the use of his miners, but he must have men to timber it up. A mine operator when he sends in a set of men to timber up the mine is not required first to send in another set of men to make the mine safe for them. Miners engaged in such

work must understand that they are putting in the timbers to make the mine safe.

Charles v. Elk Horn Mining Co. (Kentucky), 200 Southwestern 461.

MINER MAKING WORKING PLACE—CHANGING CONDITIONS.

A miner assisting as a shoveler in the operations of an electrical mining machine was injured by a fall of rock or slate from the roof on the removal of a jack by the jack setter. At the time the jack was set the roof at the place appeared safe and sound. The operations of the heavy cutting machine were sufficient to jar and loosen the roof. If the place was reasonably safe when the jack was set, the subsequent unsafe condition might have been brought about by the very work in which the injured miner, with others, was engaged and under such conditions the miners themselves are charged with keeping the working place safe.

Haggard v McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1075.

INSPECTION OF ROOF BY MINER—PRESUMPTION OF DUTY.

In an action by a miner—a shoveler, assisting in the operation of an electrical coal-cutting machine—for damages for injuries resulting from a fall of slate from the roof, it was charged that the jack setter, a miner assisting in the operation of the machine, and whose duty it was to set the jack, negligently failed to inspect the roof when he set a jack in advance of the machine. The complainant on the trial of the case offered no proof whatever to show that the jack setter did not inspect the roof. In the absence of such proof and under the law the jack setter is presumed to have done his duty in the matter of the inspection of the roof and the setting of the jack.

Haggard v. McGrew Coal Co. (Missouri), 200 Southwestern 1072, p. 1074.

RULE REQUIRING MINERS TO EXAMINE WORKING PLACE.

A rule of a mine operator required that each miner must ascertain by careful examination that the particular place in which he was employed was safe. If found to be unsafe, measures must be taken to remove the danger and before proceeding to work, if necessary, the foreman or shift boss, must be notified. Such a rule can not operate to prevent an injured miner from recovery on the ground that he, and not the shift boss, should determine the safety of his working place. The rule itself vests the shift boss with general supervisory authority over the matter of making the working places safe. In an action by a miner for injuries received by a fall of rock it appeared that the miner attempted to make his working place safe and that the shift boss intervened and told him that an examination had been

made and that the place was safe, and peremptorily ordered the miner to proceed to work. In doing this the shift boss exercised authority given by the rule, and he had authority ultimately to determine the question of the safety of a working place.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 474.

DUTY OF INSPECTION—ASSURANCE OF SAFETY.

A miner was employed as a laborer in a mine and immediately put to work loading coal taken from a room neck, which was being driven from the main entry in the mine, where the coal had been shot down ready to be loaded into the cars. While so engaged a piece of slate fell from the roof, injuring the miner, and for which a suit was brought for damages. There was nothing to show that it was the duty of the miner or the other shovelers working with him to inspect or make safe the particular place in which they worked; but it appeared from the evidence that the mine boss assured the miner that the place was safe and directed him to work at the particular place.

Carter Fuel Co. v. Filipeck (Kentucky), 201 Southwestern 468, p. 469.

APPLICATION OF SAFE-PLACE DOCTRINE TO OPERATOR OF DRILLING MACHINE.

The operator of a drilling machine in a mine was charged with the duty of inspecting and making reasonably safe the place where he was working. He had nothing to do with inspecting any other portion of the mine or making it safe, but as to the particular place of his work he absolved the mine operator from the duty of making the place safe, but he did not do so with respect to any other part of the mine. Under such circumstances the mine operator is liable for negligently permitting the roof of the mine to become unsafe, by reason of which the operator of the drilling machine was injured from rock falling from the roof of the mine in a place other than the immediate place of his work.

Urich v. Utah Apex Mining Co. (Utah), 169 Pacific 263, p. 264.

DANGEROUS INSTRUMENTALITIES FURNISHED BY OPERATOR—NEGLIGENCE IMPLIED.

The rule that the happening of an accident resulting in injury to an employee furnishes no basis for an inference of negligence does not apply where the dangerous instrumentality causing the injury was exclusively in the control of the mine operator. Under such circumstances the happening of the accident raises a presumption of negligence on the part of the mine operator and casts upon him the

burden of showing that he was without fault. The happening of the accident by reason of the employment of the instrumentalities implies negligence on the part of a mine operator, and in the absence of some explanation on his part showing that he was without fault a case is made sufficient to justify an award of damages to the injured employee.

Barry v. Badger (Montana), 169 Pacific 34, p. 36.

CONTRIBUTORY NEGLIGENCE OF MINER.

COURT MAY DECIDE AS A MATTER OF LAW.

In an action by a car driver for damages for injuries sustained on the ground of the alleged negligence of the mine operator in furnishing him vicious and unruly mules to drive and in failing to maintain a sufficient space between the car and the side of the entry, the court on hearing the evidence may determine as a matter of law that the negligence alleged was not the proximate cause of the injuries, but that the injuries were caused by the driver's own negligence.

Mayhan Jellico Coal Co. v. Bird (Kentucky), 201 Southwestern 306, p. 307.

PLEADING—FREEDOM FROM—BURDEN OF PROOF.

The fact that an employee, injured by a defective appliance, alleges in his complaint for damages that he did not contribute to the injury by his negligence does not cast the burden on him of maintaining such unnecessary allegation.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

QUESTION OF FACT.

An assistant to a mine engineer making measurements along the mine track was directed to wait a few minutes at a place on the track near the end and in front of a car. The car was loaded with coal at the top on an incline and was held in position by a prop braced against the front corner of the car and against a tie in the track. The engineer in returning to the place where his assistant was directed to remain stumbled against the prop, causing it to fall and permitting the car to start down the grade, inflicting the injuries upon the assistant for which he sued. The place where the injured miner was directed to wait and where he did remain was neither necessarily nor obviously dangerous, and while waiting at the place he was talking to the mine foreman, who was also either sitting or standing at the front end of the car. Whether or not the injured miner was guilty of contributory negligence under the circumstances was a question of fact to be determined by the jury.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

WHEN AVAILABLE AS A DEFENSE.

In an action by a miner for damages for injuries occasioned by an explosion of powder at the face of the coal, where the miner was engaged at work, the miner's contributory negligence is available to the mine manager, who was made a party and attempted to be held jointly liable with the mine operator, a corporation that had elected to reject the workmen's compensation act of Illinois, and where there was a general charge of common-law negligence.

Wendzinski v. Madison Coal Co. (Illinois), 118 Northeastern 435, p. 437.

THEORY OF DEFENSE.

Contributory negligence, where it is effective as a defense, is based on the fact that the employee's manner of meeting the inherent or apparent hazards in the employment was not consistent with reasonable care.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 924.

PROXIMATE CAUSE OF MINER'S DEATH DEFEATS RECOVERY.

An instruction in an action for the death of a miner caused by an explosion is not reversible error where it instructed a finding for the defendant, if the jury found the existence of the contributory negligence as pleaded, and that it was the proximate cause of the injury and death, notwithstanding the defendant's servants may have been guilty of negligence.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

KNOWLEDGE OF DEFECTIVE APPLIANCES.

The fact that an employee knew that an appliance was in a way defective does not charge him with knowledge that it would be negligence to use it, especially where he was assured by the mine foreman that the appliance was safe and was ordered to continue its use.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

KNOWLEDGE OF DEFECTIVE APPLIANCES—OBEYING ORDERS.

An employee believing an appliance to be defective, called the attention of the foreman to the defect in the appliance and is subsequently injured while using the appliance and because of the defect, is not to be charged with contributory negligence and his action for damages defeated on the ground of contributory negligence as a matter of law, where it appears that the employee was assured by the foreman that the appliance was safe and was at the time ordered to continue the use of the appliance.

Morgan v. Sunflower Zinc Co. (Mo. App.), 199 Southwestern 590, p. 592.

KNOWLEDGE OF DANGER—NEGLIGENCE OF FELLOW SERVANT.

A brakeman on a mine motor whose duty it was to handle and change the trolley pole from the front to the rear of the motor so that the trolley pole would follow rather than precede is not to be charged with contributory negligence because he knew that there was more danger in running the motor with the trolley pole in front than behind, where it was customary to run the motor the short distance off of a siding back on to the main track and where it was not regarded as dangerous when the motor was properly operated by the motorman.

Borderland Coal Co. v. Miller (Kentucky), 201 Southwestern 299, p. 301.

WANT OF KNOWLEDGE OF DANGER.

A miner employed as a laborer and directed to work in the neck of an entry loading coal into cars can not be charged with contributory negligence to defeat an action for injuries received by a fall of rock from the roof, on the ground that he chose a dangerous rather than a safe place in which to perform his work, where he had never before worked in the mine, knew nothing of the formation or of the condition of the roof, and was on his employment immediately directed to the place to work and was assured by the mine boss that the place was safe.

Carter Fuel Co. v. Filipeck (Kentucky), 201 Southwestern 468, p. 469.

DANGERS NOT OBVIOUS.

A miner is not to be charged with contributory negligence where he was working at the point he was directed to work by the mine superintendent and where his attention was not called to the fact that it was unsafe for him to work at a certain place alongside a conveyor in the mine on account of the fact that the wheels were not protected as at other places and on account of the fact that twentypenny nails were used to hold the wheels of the conveyor in place instead of cotter pins in the original construction. The lack of safety inhering in the machinery as primarily constructed and the dangers resulting from a failure to maintain the protecting case were not obvious to the miner.

Sloss-Sheffield Steel & Iron Co. v. Russel, 247 Federal 289, p. 291.

CUSTOMARY MODE OF OPERATING TROLLEY POLE.

A brakeman on an electric motor in a mine is not to be charged with contributory negligence in failing to change the trolley pole from the front to the rear of the motor while the motor was backing

out of a siding to get back on the main track, where it was customary to permit the trolley to remain in front of the motor for such short distances, and where it was not regarded as dangerous when the motor was carefully and properly operated.

Borderland Coal Co. v. Miller (Kentucky), 201 Southwestern 299, p. 301.

EMPLOYEE WORKING OUTSIDE SCOPE OF DUTIES.

A laborer was employed by a coal mining company in caring for a substation and the machinery and appliances therein, owned and operated by the coal company and used by it in supplying electricity for the operation of its mine. There were 22,000 volts of electricity passing through the switches for the use of the coal mining company, and it was not practical or possible to insulate wires carrying such high voltage. The switches for turning on and off the current were operated by means of wooden poles, some 6 feet in length, and there was no danger in so operating them. It was no part of the laborer's duty to repair the switches; but it was his duty when a fuse burned out of the end of a stick, to remove the stick, put a fuse therein and replace the switch stick, and this work was not attended with danger. On the occasion of the accident the laborer was directed by the general manager of the coal company by telephone to pull the switches and notify the miners to come out of the mine, as there would be no more power. Upon receiving such directions the laborer pulled the switch sticks and thereupon procured a ladder, placed it against the wall near one of the switches, climbed up to an iron pipe about 12 feet from the floor, and there came in contact with the pipe and the switch or wire and was thereby killed. Under such circumstances there can be no recovery for the death of the laborer, as the direct and proximate cause of his death was his own negligence in voluntarily and outside of the line and scope of his duties going into a place of danger and in disregard of express instructions.

Caulkins v. Wyoming Coal Mining Co. (Wyoming), 171 Pacific 265, p. 266.

DECLARATIONS OF DECEASED MINER—PROOF.

The declarations of a deceased person when a part of the *res gestae* are admissible whether they are in favor of or against the interests of the estate of the deceased. When the declaration is not a part of the *res gestae*, it is admissible if it is against the interest of the declarant, but not when it is in his favor. Dying declarations as such are not admissible *per se* in civil cases, but are governed by the general rule of admitting declarations against interest. Under these rules the declaration of a deceased miner made after the injury and before his death tending to show that he was guilty of

contributory negligence and other declarations as to his experience and instructions to him as to the use of a safety lamp, and the cause of the injury, were admissible as declarations against his interest.

Alverson v. Little Cahaba Coal Co. (Alabama), 77 Southern 547, p. 551.

ASSUMPTION OF RISK.

RISKS ASSUMED.

DOCTRINE OF ASSUMPTION OF RISK.

Assumption of risk is a condition in a contract of employment, either express or implied from the circumstances of the employment, by which the employee agrees that dangers of injury ordinary and obviously incidental to the discharge of his duties in the particular employment shall be at his own risk.

Pringle v. Carthage Quarry Co. (Mo. App.), 199 Southwestern 561, p. 562.

BASIS OF DOCTRINE.

The defense of assumed risk is ordinarily regarded as predicated on the theory that an employee or a miner, as an element in his contract of employment, has agreed for a consideration to relieve his employer from liability for injuries he may suffer by reason of inherent or apparent hazards in the employment.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 924.

RISKS INCIDENTAL TO EMPLOYMENT.

A miner assumes all such risks incidental to his employment as are not the result of the employer's negligence.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

INHERENT HAZARDS OF EMPLOYMENT.

At common law the risk of injury as the result of changing conditions in a miner's working place is considered a danger or hazard inherent in the employment which the miner is bound to assume.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 925.

DANGERS CREATED BY MINER.

Where an injury to a miner while working in a mine was proximately caused by a danger which the miner himself caused as an accident in the course of the very work which he at the time was doing, the miner assumes the risk and can not recover for his injury.

Rock Island Coal Mining Co. v. Toleikis (Oklahoma), 171 Pacific 17, p. 18

DANGERS IN WORKING PLACE.

The operator of a drilling machine in a mine who was bound to make the particular place in which he worked safe, assumes the risk of injury from rock falling from the roof of the mine in the particular place in which he works and which he is required to keep safe.

Urich v. Utah Apex Mining Co. (Utah), 169 Pacific 263, p. 264.

VIOLATION OF RULE—FAILURE TO INSPECT.

A rule of a mine operator duly adopted and posted required the miners to inspect the roof after each blast as the work progressed and to cease working and report to the foreman whenever the roof became unsafe. A miner who violates the rule and fails to inspect the roof after a blast and continues to work in the place, assumes the risks incident thereto and can not recover for an injury resulting therefrom.

Elk Horn Mining Corp. v. Vahoose (Kentucky), 200 Southwestern 921, p. 923.

MINER ENGAGED IN CREATING WORKING PLACE.

A miner working in a mine and engaged in creating the place in which he works assumes the risk of any injury likely to result to him by reason of a fall of rock caused by his operations as one of the ordinary risks incident to the employment.

Barry v. Badger (Montana), 169 Pacific 34, p. 36.

KNOWLEDGE OF CONDITIONS—PRESUMPTION.

A driver of a coal car in a mine who had gone in and out of an entry three times daily for 11 days during a period of three months must be presumed to have knowledge of the width of an entry and must know that the entry was too narrow for him safely to alight from the side of the car between the car and the entry wall.

Mayhan Jellico Coal Co. v. Bird (Kentucky), 201 Southwestern 306.

MINER'S KNOWLEDGE OF DANGEROUS METHODS.

A miner was injured while working in a coal mine by the explosion of a powder charge which he and his helper were placing in a hole prepared by them and while shoving the charge into the hole with a steel tamping bar. The miner was duly certified under the statute of Pennsylvania; had worked six years in the mine and over three years as a certified miner and had fired thousands of blasts. The coal vein on which he was working contained some hard rock called "sulphur"; the miner was familiar with this formation and had heard that a blow of steel on "sulphur" would produce sparks but had not himself seen that effect. He was himself in charge of the

work and furnished his own tools and was the only kind of a person lawfully authorized to do the work he was doing. He had been accustomed to this labor for years and if sparks may be produced from damp rock from a blow by a steel tamper he had had every opportunity of learning the truth about the matter, larger than that of all except other miners. Knowledge of such dangers was part of his equipment for work and to ascertain and remember the fact required nothing but ordinary judgment and common observance.

Lehigh & Wilkesbarre Coal Co. v. Sawickas, 247 Federal 432, p. 434.

KNOWLEDGE OF OPERATOR'S NEGLIGENCE.

A miner will be regarded as having assumed such risks as result from his employer's negligence if he had or ought to have obtained knowledge of such risk before his injury was received.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

NEGLECTANCE OF MINE OPERATOR—WHAT INCLUDED.

When referring to a mine operator's negligence in connection with the rules pertaining to assumption of risk there is included in the term "negligence" any and every failure of the mine operator to fulfill his obligation to provide for his miners' safety.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

DANGERS FROM UNEXPLODED SHOTS—MINER'S KNOWLEDGE.

A miner assisting in sinking a shaft and injured by an explosion of a charge of dynamite in a misfire hole resulting from the failure of a prior shift of miners to explode all the charges placed in the hole assumed the risk of the explosion where it appeared that he was an experienced miner; that the shaft in which he had been and was working was a very wet one, and that in such shafts there are more misfire holes than in dry shafts, and that in this particular shaft there was a greater per cent of misfire holes than he had ever known in other shafts; that he did not know of any shifts but that had left misfire holes; that he did not know the kind of fuse used in the misfire holes; but he did not consider the fuses used of the best quality, and so informed the superintendent; that he was advised that the former shift reported that there were two misfire holes, but the particular location of the misfire holes could not be given; that he made all possible effort to find the misfire holes but failed and concluded there were no such holes. Being fully advised as to the risks, it is immaterial whether he knew the causes and also immaterial as to whether those risks were brought about by negligence on the part of the mine

operator. It can not be said that because the miner concluded that there was no misfire hole that he did not comprehend the risk.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

RISKS NOT ASSUMED.

DANGERS RESULTING FROM OPERATOR'S NEGLIGENCE.

A miner assumes no risk from dangers resulting from the mine operator's negligence.

Peterson v. Otho Development & Power Co. (South Dakota), 166 Northwestern 147, p. 148.

An employee never assumes the risk of danger due to the employer's negligence.

Staggs v. Gotham Mining & Milling Co. (Mo. App.), 199 Southwestern 717, p. 719.

NEGLIGENCE OF SHIFT BOSS.

A miner working in a mine and injured by a fall of rock does not assume the risk or dangers incident to his working place, where the shift boss had the authority to direct the miner to work in the particular place and informed him that he had inspected the rock and that the place was safe.

Federal Mining & Smelting Co. v. Anderson, 247 Federal 472, p. 473.

DANGERS OUTSIDE OF WORKING PLACE.

The operator of a drilling machine in a mine does not assume the risk or dangers and consequent injury in parts of the mine other than at his particular place of work.

Urich v. Utah Apex Mining Co. (Utah), 169 Pacific 263, p. 264.

SCOPE OF EMPLOYMENT.

MINER WAITING UNDER DIRECTIONS OF SUPERIOR.

A miner assisting a mine engineer in making measurement on and along the mine track was directed by the engineer to wait at a particular place on the track, until he made some measurements a short distance away. While so waiting, and through the carelessness of the mine foreman or boss, a loaded car against which the miner was standing or sitting was released, started down the incline, and injured the waiting miner. Under such circumstances the miner while waiting at the command of the mine engineer was engaged in the line of his employment at the time of the accident.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

PROXIMATE CAUSE OF INJURY.

PROXIMATE CAUSE DEFINED.

An act is the proximate cause of an event which in the natural order of things and under the particular circumstances surrounding it such an act would necessarily produce that event. The practical construction of proximate cause by a court is a cause from which a man of ordinary experience and sagacity could foresee that the result might probably ensue; but the law goes no further back than to find an active, efficient, and procuring cause of which the event under consideration is a natural consequence.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 50.

QUESTION OF FACT.

A mine operator, by his foreman, directed a miner to hold an unguarded insulator attached to a live wire while other employees attached the wire to a pole some distance away. While in the act of attaching the wire, the employees by jerking it caused the miner's hand to come in contact with the live wire, causing the injury complained of. Whether or not the negligence of the mine operator in furnishing the miner an unguarded insulator without releasing the live wire was the proximate cause of the injury, was a question of fact to be determined by the jury.

Elk Horn Mining Corp. v. Pitts (Kentucky), 201 Southwestern 9, p. 10.

METHODS OF DETERMINING.

In determining what is the proximate cause of an injury it is proper to inquire and ascertain whether the injury is a natural and probable consequence of the negligent act; or, if it is such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by a reasonably prudent person in the exercise of ordinary care, as likely to result from the act complained of.

Loveless v. Cunard Mining Co. (Mo. App.), 201 Southwestern 375, p. 379.

NEGLIGENCE OF OPERATOR.

The negligence of a mine operator to render him liable for an injury to a miner must be the proximate cause of the injury, and a connection between the act or omission and the resulting injury must be shown. As a matter of pleading a complaint is insufficient if it fails to show a connection between the alleged negligence of the mine operator and the injury to the miner, or where the contrary

appears from the other allegations in the pleading. No particular form of allegation is necessary and, where the negligent act causing the injury is set out with the allegation that by reason of, by, through, or in consequence of such negligence the miner was injured, it is equivalent to an allegation that the operator's negligence caused the injury or that the injury was wholly caused thereby.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 49.

NEGLIGENCE OF EMPLOYER—CARE EXERCISED BY EMPLOYEE.

In an action by an injured miner under the Indiana employer's liability act of 1911 to recover for injuries sustained during the course of his employment, he is entitled to recover if the jury determines: (1) that negligence on the part of the mine operator, or those for whose acts he is responsible, proximately contributed to the injury complained of; and (2) that the miner's conduct in the face of the hazard which resulted from such negligence was characterized by the exercise of due care for his own safety.

J. Woolley Coal Co. v. Tevault (Indiana), 118 Northeastern 921, p. 926.

NEGLIGENCE OF OPERATOR OR OF FELLOW SERVANT.

In an action by a miner for damages for injuries caused by a car loaded with coal running upon and against him the jury should be instructed as to the meaning of proximate cause and left to determine whether the proximate cause of the injury complained of was the negligence of the mine operator in insecurely propping the coal car on an incline, or whether it was the negligence of a fellow servant in brushing or stumbling against the prop, knocking it down and releasing the car.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

NEGLIGENCE OF MINER—PLEADING.

The fact that an injured miner alleges in his complaint that his injuries were proximately caused by the negligence of the mine operator, yet if it appear from the facts pleaded that the negligence of the mine operator as alleged had no casual connection with the miner's injuries, or if the injuries were proximately caused by some other agency, or by the act of the injured miner himself, the complaint as a matter of pleading would not be sufficient.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 49.

FAILURE TO FURNISH PROPS—MISTAKEN JUDGMENT OF MINER.

A coal mine operator may be liable for injuries to a miner caused by a fall of rock because of the failure of the operator to furnish

props if such failure was the proximate cause of the injury. Such failure is not excused and consequent liability avoided because the miner was mistaken in his judgment and believed that the rock would not fall if he continued his work.

Western Coal & Mining Co. v. Watts (Arkansas), 199 Southwestern 921, p. 923.

INTERVENING AGENCY.

As a general rule a mine operator although guilty of a negligent act that would not have produced the injury complained of but for the subsequent intervening negligence of another, will not be responsible for damages resulting from the injury. The test of whether the act complained of was the proximate or remote cause of the injury is to be found in the probability of injurious consequences which were to be anticipated, and not in the number of subsequent events and agencies that might arise.

Corrigan v. Oklahoma Coal Co. (Oklahoma), 171 Pacific 47, p. 49.

FORMER APPEAL—LAW OF CASE.

On appeal in an action by a miner for damages caused by the alleged negligence of the mine operator it was held that as a matter of law the alleged negligence of the mine operator was not the proximate cause of the injuries complained of. This holding of the law must follow the case through all its subsequent stages and must be the guiding rule on a subsequent trial where the evidence on the subject is substantially the same as on the former trial.

Mayhan Jellico Coal Co. v. Bird (Kentucky), 201 Southwestern 306.

CONTRACTS RELATING TO OPERATIONS.

DUTY TO CONTRACTEE—LIABILITY FOR INJURIES.

A miner employed by a coal mine operator under a contract by which he was to receive so much per ton for shooting and loading coal, after the company had mined it, the miner furnishing labor, powder, fuses, and tools, and the mine operator furnishing the timber, cars, and rails, the miner having full charge and control of the mine where he worked and entirely responsible therefor, is not an employee of the mine operator but a contractor and stands in the relation of an invitee upon the mine operator's premises and to whom the mine operator owes the duty of ordinary care and prudence as to his safety.

Benoit Coal Mining Co. v. Faught (Alabama), 77 Southern 695.

INDEPENDENT CONTRACTOR.

LIABILITY OF OPERATOR FOR INJURIES TO.

A complaint in an action against a coal mine operator for damages alleged that the complainant had a contract with the operator to mine coal in his mine at a stated price per ton; that under the contract it was the duty of the mine operator to furnish all materials, including cars, rails, and the men to operate the cars, and the complainant mined and loaded the coal; that the mine operator used mining cars operated by electricity; that while the complainant was engaged in the discharge of his duty under his contract and was in the lawful use of the entries in the mine necessary and proper in the discharge of his duties, the defendant's agents and employee, while engaged in the discharge of their duties, negligently allowed the coal cars to run along and over the tracks in the entry where the complainant was discharging his duties and upon or near where the complainant was at work; and that an iron or steel rail or bar which was then being carried on one of such cars struck the complainant; and that such rail or bar was thereby driven through his person in the region of his hips or thighs causing the injury complained of. As shown by these averments the complainant stood in the relation of an invitee upon the mine operator's premises as a contractor and to whom the mine operator owed the duty of ordinary care and prudence as to his safety. The complaint stated a good cause of action for damages.

Benoit Coal Mining Co. v. Faught (Alabama), 77 Southern 695.

METHODS OF OPERATING.

FIRST-CLASS MINING—MEANING.

A coal mining company owning a small tract of coal land on the State line procured a lease from the owner of a large tract of coal lands in the State of Missouri. By the terms of the lease the mining company, the lessee, undertook to mine, raise to the surface, and remove all the minable coal in the Missouri tract that could be dug or mined under the rules of first-class mining prevailing in the Southern Kansas District. It must be presumed under the lease that the Kansas mining company was well acquainted with the nature and conditions of the work it was engaged to perform, the mineral character of the land upon which it was to be practiced, and the rules of first-class mining prevailing in the Southern Kansas District. In the absence of any reference to such rules it will be presumed that they mean good, safe mining with respect to the conservation of the product, the protection of the miners and the pre-

vention of injury to the surface, all of which will be implied if not expressed.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 234.

OPERATION OF OIL REFINERY—LAWFUL BUSINESS—LIABILITY.

A complaint by a land owner against the owner and operator of an oil refinery demanded damages for injuries to his land because of large quantities of oil, refuse, and poisonous substances permitted to escape from the refinery and run upon and over his land producing the injuries complained of. There was no allegation of any unnecessary act of the owner of the refinery in the construction or operation of the same and no averment that in its operation the owner was guilty of any negligent act or omission. Such an action is not based upon negligence but upon the maintenance of a nuisance. An owner of property, although conducting a lawful business, is subject to reasonable limitations. He must use his property so as not unreasonably to interfere with the health or comfort of his neighbors or to their right to the enjoyment of their property. If he makes an unreasonable or unlawful use of it, so as to produce material injury or great annoyance, he will be guilty of a nuisance and will be liable for the consequent damages. It is not necessary that the use to which the property is put shall be unlawful in itself in order to constitute a nuisance in the eyes of the law, nor will the fact that the business is carried on carefully and in accordance with reasonable methods employed in such business relieve the owner of liability to another if the use is unreasonable and such as constitutes a nuisance.

Helms v. Eastern Kansas Oil Co. (Kansas), 169 Pacific 208, p. 209.

BREACH OF CONTRACT TO DEEPEN WELL—LOSS OF PROFITS AS DAMAGES.

A party contracting to deepen an oil well at a certain specified sum per foot and who was prevented from completing the work by the wrongful refusal of the contractor to furnish material as agreed upon, is not limited, in an action for damages for the breach of the contract, to a loss of prospective profits and the amount of profits lost under such circumstances is not the sole measure of damages, and while he may, under proper pleading and proof, recover for a loss of prospective profits, he is not limited to this recovery but may recover for the amount expended and for the value of his own services.

Blair v. Brownstone Oil & Refining Co. (Cal. App.), 170 Pacific 160.

COMMON AGENCY—LIABILITY OF JOINT USERS.

An oil company owned and maintained a pipe line laid upon the surface of the ground. A gas company used the pipe line as one of

its agencies in supplying gas to the oil company, the owner of the pipe line, and to other customers along the line. The pipe line was one of the instrumentalities used by the gas company and it was under a duty to see that this instrumentality was in a reasonably safe condition before it began the use of it for the purpose of furnishing gas to its customers and thereafter to see that the line was maintained in a reasonably safe condition. Persons using a common agency in the conduct of their business may be equally liable to a third person injured by the negligent and careless construction and maintenance of such agency though the agency itself is owned by one of the parties only.

Starcher v. South Penn Oil Co. (West Virginia), 95 Southeastern 28, p. 35.

MINING AND SHIPPING COAL—STABILITY OF INDUSTRIES.

The mining, transportation, and sale of coal, considered as a whole, has acquired under normal conditions qualities, characteristics, developed principles, and has brought into existence conditions that can not be instantly altered for the convenience of persons desiring the temporary introduction and maintenance of new qualities, principles, methods, and conditions without a disastrous dislocation and disturbance of those previously fixed and settled by long experience, vast expenditures of money and exercise of the highest degree of skill and efficiency. Mining and coal transportation are closely allied industries, mines are opened and equipped with reference to railroads, and railroads built, equipped, and operated with reference to the mines and coal markets and terminal requirements and facilities.

Baltimore & Ohio R. R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

RIGHT TO SURFACE SUPPORT.

LIABILITY—PROOF OF DAMAGES.

In an action by the surface owner for damages for the subsidence of the surface caused by the mining operations a recovery is justified where the evidence tended to show that the surface of the land had subsided in 250 or 260 different places within two years prior to the commencement of the action and where the evidence tended to show the decrease in the value of the surface of the land caused by the subsidence of the surface.

Walsh v. Kansas Fuel Co. (Kansas), 169 Pacific 219, p. 220.

LIABILITY FOR SUBSIDENCE OF SURFACE—STATUTE OF LIMITATIONS.

An action for damages by a land owner against a mine operator for damages caused by the subsidence of the surface of land brought

about by mining coal therefrom, is not barred by the statute of limitations until two years have elapsed after the surface has subsided. Such an action does not accrue and the statute does not begin to run until the land has subsided.

Walsh v. Kansas Fuel Co. (Kansas), 169 Pacific 219, p. 220.

LABOR ORGANIZATIONS.

RIGHT OF MINE OPERATOR TO EXCLUDE UNION MINERS.

The fact that a coal mine operator endeavored to secure a closed nonunion mine through individual agreements with his miners and employees furnishes no excuse for the employment of coercive measures to secure a closed union mine through an agreement with the union. The mine operator had a legal and constitutional right to exclude union men from employment in his mine. There was no middle ground open to the operator; no option to have an "open shop" employing union men and nonunion men indifferently; it was the union that insisted upon "closed shop" agreements requiring even carpenters employed about the mine to be members of the union and making the employment of any nonunion man a ground for a strike. A mine operator is in the reasonable exercise of his rights in excluding all union men from his employ, where he has learned from previous experience that unless this was done union organizers might gain access to his mine in the guise of laborers.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 73.

RIGHT OF MINE OPERATOR TO LABOR OF MINERS.

A coal-mine operator who in the exercise of his undoubted rights has established a working agreement between himself and his employees, with the free assent of the latter, is entitled to be protected in the enjoyment of the resulting status, the same as in any other legal right. The fact that the employment is "at will" and terminable by either party at any time does not change the rule.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 72.

OPERATOR ENTITLED TO GOOD WILL OF EMPLOYEES.

A coal mine operator is entitled to the good will of his employees, precisely as a merchant is entitled to the good will of his customers, although they are under no obligation to continue to deal with him. The value of this relation lies in the reasonable probability that by properly treating his employees and paying them fair wages and avoiding reasonable grounds of complaint, he will be able to retain

them in his employ and to fill vacancies that may occur by the employment of other men on the same terms. The pecuniary value of such reasonable probabilities is incalculably great and is recognized by law in a variety of relations.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 73.

EMPLOYMENT UNDER AGREEMENT NOT TO JOIN UNION.

A coal mine operator is as free to make nonmembership in a union a condition of employment as a miner is free to join a union, and this is a part of the constitutional rights of personal liberty and private property not to be taken away even by legislation, unless through some proper exercise of the paramount police power. A coal mine operator is acting within his lawful rights in employing miners only upon terms of continuing nonmembership in the "United Mine Workers of America." The rule is particularly applicable, if explanation or justification is needed, where the operator's repeated costly experiences of strikes and other interferences while attempting to run "union" had induced him to run nonunion and to make nonmembership in the union a condition to continued employment.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 73.

PEACEABLE METHODS TO ORGANIZE TRADE UNIONS—INDUCING BREACHES OF CONTRACTS.

Officers and agents of the United Mine Workers of America in no way connected with the operations of a particular mine, but seeking to organize the mine as a union can not assume that all measures that may be resorted to are lawful if they are peaceable and if they stop short of physical violence or coercion through fear of it. On the contrary, any violation of the operator's legal rights contrived by such officers and agents for the purpose of inflicting damages or having that as its necessary effect is as plainly prohibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by the operator's employees constitutes such a violation.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 74.

INDUCING MINERS TO QUIT EMPLOYMENT.

A right of action for persuading an employee to leave his employer is universally recognized and rests upon fundamental principles of general application, not upon the English statute of laborers, and applies to persons inducing or persuading miners to leave their employers.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 73.

INDUCING MINERS TO JOIN UNION—LIMITATION OF RIGHT.

Ordinarily members and officers of a labor union have the right to invite men to join their union, but where they have notice and knowledge that a particular mine was run "nonunion" and that none of the miners had a right to remain at work in the mine after joining a union and that the observance of this agreement was of great importance and value both to the mine operator and to the miners, who have voluntarily made the agreement and desired to continue working under it, such members and officers must refrain from unnecessarily injuring the operator, and they may be enjoined and restrained from deliberately and advisedly selecting a method of enlarging their membership which would inflict great injury upon the operator and his loyal employees.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep., 65, p. 73.

INTERFERENCE WITH EMPLOYEES—UNLAWFUL PURPOSE—INJUNCTION.

The purpose entertained by officers and agents of the United Mine Workers of America to bring about a strike at a particular coal mine in order to compel the operator, through fear of financial loss, to consent to the unionization of his mine as a lesser evil is an unlawful purpose, and methods resorted to by such officers and agents to induce all the miners employed to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, connected with misrepresented, deceptive statements and threats of pecuniary loss communicated to the miners employed, were unlawful and malicious methods and not to be justified as a fair exercise of the right to increase the membership of the union. The mine operator under such circumstances is entitled to relief by injunction.

Hitchman Coal & Coke Co. v. Mitchell, 36 Supreme Ct. Rep., 65, p. 74.

RIGHT OF OFFICERS AND AGENTS OF UNION TO REPRESENT WORKMEN.

The officers and agents of a labor union entirely disassociated from a coal mine employer have no agency for the latter's employees and have no right to interfere in the absence of any disagreement or grievance in behalf of the miners, but if such disagreement or grievance existed the officers and agents of the union could not, without agency, set up any rights that the miners might have. The right of miners and employees to strike does not give to such officers and agents of a union the right to instigate a strike.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep., 65, p. 73.

EFFORTS TO ORGANIZE A MINE AS UNION—ACTS ENJOINED.

Where officers and agents of the United Mine Workers of America attempt to reorganize and unionize a mine the operator is entitled to an injunction restraining them from acts and conduct: (1) Interfering or attempting to interfere with his miners for the purpose of unionizing the mine without his consent, by representing to the miners employed that they will suffer, or are likely to suffer some loss or trouble in continuing in or in entering the employment of the operator by reason of his not recognizing the union or because he runs a nonunion mine; (2) interfering or attempting to interfere with the operator's miners employed for the purpose of unionizing the mine without his consent and in aid of such purpose knowingly and willfully bringing about the breaking by the miners of contracts of service known to exist with the employer and present and future employees; (3) knowingly and willfully enticing the operator's employees to leave his service on the ground that he does not recognize the United Mine Workers of America or runs a nonunion mine; (4) interfering or attempting to interfere with the operator's employees so as knowingly and willfully to bring about the breaking by the employees of their contracts of service known to exist, especially from knowingly and willfully enticing the employees to leave the employer's service without his consent; (5) trespassing on or entering upon the grounds and premises of the employer or his mine for the purpose of interfering therewith or hindering or obstructing the business or with the purpose of compelling or inducing by force, intimidation, violence, or abusive language or persuasion any of the employer's employees to refuse or to fail to perform their duties as such; or (6) compelling or inducing or attempting to compel or induce by threats, intimidation, or abuse or violent language any of the employer's employees to leave his service or to fail or refuse to perform their duties as such employees or compelling or attempting to compel by like means any person desiring to seek employment at the employer's mine and works from so accepting employment therein.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 74.

RIGHT OF LABORERS TO FORM UNIONS—PROPER EXERCISE OF RIGHT.

The right of working men to form unions and to enlarge their membership by inviting other workmen to join is conceded when the objects of the union are proper and legitimate. But the right is not so absolute that it may be exercised under any circumstances and without any qualification. Like other rights that exist in civil society, it must always be exercised with reasonable regard for the conflicting rights of others. The maxim that requires one person to

“so use his own property as to not injure that of another person” is extended and requires one to use his property as not to injure the rights of another.

Hitchman Coal & Coke Co. v. Mitchell, 38 Supreme Ct. Rep. 65, p. 73.

SPECIFIC PERFORMANCE OF CONTRACT—OWNERSHIP OF PROPERTY.

The trustees for the Western Federation of Miners, a voluntary, unincorporated association of persons, and others as members of the association, brought an action against the Butte Miners' Union asking the court to decree that the miners' union had no interest in certain lands and property owned by the Western Federation of Miners, and asking a decree requiring the miners' union to perform all the terms of a certain charter from the Western Federation of Miners to the miners' union by conveying to the former certain property described, and seeking to restrain the miners' union from asserting claim to the property described. It was averred in the complainant's bill that the charter contained a clause and a provision to the effect that if the union should withdraw or be absolved, suspended, or forfeit the charter, all property, money, books, and papers should become the property of the Western Federation of Miners. The evidence showed that the original charter of 1893 was lost or destroyed, and that a new charter was issued in 1914. The evidence as to whether the new charter contained the forfeiture provision was conflicting and contradictory and insufficient to establish the forfeiture clause, and specific performance could not be decreed and a forfeiture of the property would not be ordered. Where the terms of a contract are not certain in themselves, so as to enable a court to arrive at the clear result of what all the terms are, the contract will not be specifically enforced.

Moyer v. Butte Miners' Union, 246 Federal 657, p. 659.

NUISANCE.

OPERATION OF OIL REFINERY.

Whether or not a use which is in itself lawful is a nuisance depends upon the locality and surroundings, the number of people in the vicinity, the prior use, whether it is continual or occasional, and the extent of the nuisance and injury caused to the neighbors from the use. If the injury is slight and trivial and occurs in the development of the natural resources of the land it is not deemed to be unreasonable. In the instant case the oil treated by the refinery company at the refinery was obtained elsewhere, and its operation had no connection with the products of the land or the development of its natural resources and under the evidence the quantity of oil,

refuse, fumes, and gases that were thrown upon complainant's land constituted an unreasonable use and a nuisance. However useful and lawful a business in itself is the company can not be permitted to carry it on in such a way as to cause material injury to the complainant and when the injurious substances were thrown upon his land in excessive quantities and in the manner shown, the use of the refinery became both unreasonable and unlawful.

Helms v. Eastern Kansas Oil Co. (Kansas), 169 Pacific 208, p. 209.

See Auxford Brown Ore Co. v. Hudson (Alabama), 77 Southern 243.

OIL REFINERY—ESCAPE OF OIL.

If the owner of a refinery permits oil, refuse, and poisonous substances in large quantities to escape from the refinery and flow over and upon adjoining lands causing material injury to the owner thereof, the use of the refinery will be deemed to be unreasonable and to constitute a nuisance.

Helms v. Eastern Kansas Oil Co. (Kansas), 169 Pacific 208, p. 209.

MINING LEASES.

LEASES GENERALLY—CONSTRUCTION.

CONSTRUCTION AND EFFECT—ESTATE GRANTED.

A mining lease for discovery of minerals vests a conditional estate in the lessee, but does not vest title to the minerals in place. It is an incorporeal right to mine, the exercise of which may exhaust the minerals. This right is beyond the control of the lessor, his heirs or assigns as long as the conditions upon which it depends are complied with, and therefore it binds the lands in the hands of the lessor and all persons holding under him. Whatever the right of the lessee may be when accurately defined, he is not the owner of the minerals in place, and the lease does not sever the minerals from the surface. But the lease vests an estate potential until the discovery of minerals, and actual afterwards, and that estate carries the right to exhaust the minerals.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 741.

CONSTRUCTION—CANCELLATION—RECOVERY ON THEORY OF PLEADING.

An action for the cancellation of a mining lease was based on an alleged forfeiture by reason of certain specific violations of the lease. Before a judgment of cancellation can be sustained it must appear that the lessor is entitled to the relief granted on the case as made and the pleadings presented, as he can not sue upon one theory and recover upon another.

Rembarger v. Losch (Ind. App.), 118 Northeastern 829, p. 833.

CONSTRUCTION—ABANDONMENT BY SUBLESSEE—DUTY OF SUBLESSOR TO PREVENT DAMAGES.

The lessee of a mine subleased the same to another for the purpose of operation, the lease providing that if the lessee should at any time fail or refuse to keep any stipulation on its part the sublessor might at his option terminate the lease and retake possession of the property after 10 days written notice thereof. The lease also provided that the lessee should have the right and privilege of terminating the lease at any time by giving the sublessor 30 days' notice in writing of such intention, the 30 days to be after the delivery to the lessor of the written notice. The mine was one that required the operation

of pumps constantly to prevent flooding. On a certain date the sublessee notified the sublessor of his intention to terminate the lease and also that he would suspend operating the pumps and authorized the sublessor to take possession of the property at any time and operate or protect the same. Shortly thereafter the sublessee abandoned the mine and neither he nor the sublessor did anything to protect it during the month following the abandonment. Thereupon the original lessor declared a forfeiture of the lease, and took possession of the property. Thereupon the original lessee, the sublessor, brought suit against the sublessee for damages for failure to comply with the terms of the sublease. The breach relied upon being the abandonment of the property during the 30 days covered by the notice, thereby giving a right to the owner to forfeit the lease and thereby losing the value of his lease. By its terms the sublessee could abandon the lease at any time on 30 days' notice and on receipt of such notice it was the duty of the sublessor, the original lessee, to protect himself from loss and to prevent forfeiture of his own lease. If he had gone into the possession of the mine and worked it during the period of 30 days he could have recovered as damages all the loss which he suffered by such operation, as such damages would have been the direct result of the sublessee's violation of the contract. But the complainant can not recover in an action against the sublessee damages that are not the direct result of the latter's violation of the sublease but are more properly referable to the complainant's violation of his own lease with the owner of the mine. Where a party is entitled to the benefit of a contract and can save himself from a loss arising from a breach of it at a trifling expense or with reasonable exertion, it is his duty to do so; and he can charge the delinquent with such damages only as with reasonable endeavors and expense he could not prevent. By the word "trifling" is meant a sum which is trifling in comparison with the consequential damages which the plaintiff is seeking to recover in the particular case. Under the circumstances the complainant was entitled to recover the nominal sum of \$1 only.

Bearcat Mining Co. v. Grasselli Chemical Co., 247 Federal 286, p. 287.

COAL LEASES.

CONSTRUCTION—INTENTION OF PARTIES.

The intention of the parties to a coal lease is its life, breathed into it in words, and these words must be applied as the parties applied them to the thing about which they were written. When two constructions may be equally admissible in a purely abstract sense the law then leans to concrete justice.

Uniou Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 233.

CONSTRUCTION—EFFECT AS A CONVEYANCE.

A coal lease in the nature of a conveyance of the right to mine, excavate, and remove coal underlying a tract of land is not a mere grant of an easement, but is a sale of the coal itself and is a conveyance of an interest in the land.

Simmons Coal Co. v. Board of Review, etc. (Illinois), 118 Northeastern 753, p. 754.

PRESUMPTION AS TO PURPOSE—CONSTRUCTION.

Parties will be presumed to have contracted with a view to the existence of the subject matter of the contract, which in a coal lease is the coal. The parties contracted with a view to its exhaustion, and so long as this remained unaccomplished and the lessee retained possession of the leased land, mining, appropriating, and removing the coal, it was bound to perform the conditions of the contract, under which it alone claimed the right to do so, by making the stipulated payments.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 236.

CONSTRUCTION—TECHNICAL TERMS.

There is no rule of law which prohibits parties from making contracts concerning the mining of coal as fully and freely as for any other purpose and in the construction of such a contract a court is confined in its consideration to the terms of the contract alone. In construing such a contract the court will not consider the divergent technical significance in proper cases of the words "lessor," "lessee," "rents," royalties," "license," and others used indiscriminately in the instrument where its terms define such words so definitely that there can be no mistaking the sense in which they are used.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 235.

CONSTRUCTION—SUBJECT MATTER AND OBJECT—MINING ALL COAL.

A trustee holding a large amount of coal lands desired to have the coal mined out before the expiration of the trust. With this intention he executed a lease to a mining corporation owning an adjoining tract of coal land which recited that for and in consideration of the rents and royalties provided for and the covenants, agreements, and conditions set out, and to be kept, performed, and complied with by the lessee, the lessee had the right to take the coal from under the lands describing them containing in all 630 acres. This lease gave to the lessee the right to take the coal from under the land for a period of 12 years from April 1, 1901. The lease further provided

that the lessee should mine and carry away all the minable coal in the lands described that can be dug or mined under the rules of first-class mining prevailing in the southern Kansas coal district. The lessee on its part covenanted that it would mine and remove from the land all minable coal contained therein within the stated time and that it would mine and raise all minable coal without reference to size or quality existing underneath the surface of the land described. The lessee bound itself so to conduct its operations as to admit of the digging, raising or hoisting, and removing all minable coal in the lands and that it would have and maintain at its own expense sufficient equipment to promptly remove all coal mined. The terms of the lease leave no doubt as to its subject matter or object. The former was all the coal underlying the surface of the land described; and the latter was the mining and removing of all the coal, and when that was done and paid for the terms of the lease were fulfilled and the lessee could remove all equipment from the land. All the provisions of the lease lead to the mining and removal of all the coal under the land described.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 *Southwestern* 230, p. 234.

INDUCEMENT TO EXECUTION—CONSTRUCTION.

A coal lease was induced from the fact that the lessor, as trustee, had a large tract of land underlaid with coal which he desired to dispose of in place during the administration of the trust, extending for some 14 years, without the trouble and danger of mining it. The lessee was a coal mining corporation owning a smaller tract of coal land adjoining the tract of the trustee. These two interests came together in a lease in which the intention is fully developed and which must control in the construction of the lease.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 *Southwestern* 230, p. 233.

CONVEYANCE OF COAL WITH MINING RIGHTS—CONSTRUCTION.

A deed or lease granted to the lessee for the term of 10 years a certain described tract of land and a specified vein of coal known to exist therein with mining rights, together with the plant and all improvements and fixtures thereon, with covenants of good title and quiet and peaceable possession but without warranty of acreage or quantity of coal. In consideration of the grant the lessee covenanted and agreed to pay the lessor during the term 10 cents per ton for coal mined and guaranteed a minimum of at least \$31,000 to be paid in stated installments. During the term of the lease the grant constitutes a sale of coal in place upon the condition that it be removed during the term of the lease. The lease was operated and pay-

ments made as provided in the lease; but when the coal was all mined out it was found that on the basis of the royalty named overpayment had been made by the lessee to the lessor. The deed or lease contained no warranty or guaranty on the part of the lessor and none can be implied to the effect that the land leased contained 310,000 or 345,000 tons of coal as contemplated by the parties. In the absence of a warranty either express or implied and in the absence of mistake, fraud, or misrepresentation there is no liability on the part of the lessor for deficiency in quantity or quality of coal and the lessee can not recover for any payments made pursuant to the terms of the lease but in excess of the royalty on the coal actually mined.

National Coal Co. v. Overholt (West Virginia), 94 Southeastern 735, p. 737.

ACTION FOR ROYALTIES—EVIDENCE—STATEMENT OF ACCOUNT.

In an action by the lessor of coal lands and a coal mine on a bond given by the lessee to secure the payment of royalties on coal mined within a given term an amended statement of claim was properly admitted in evidence upon the ground that the statement was not specifically or sufficiently denied in the affidavit of defense.

Pittsburgh Block Co. v. Olive Coal Co. (Pennsylvania), 103 Atlantic 52.

ROYALTIES—LIEN ON FIXTURES.

A coal lease provided that all rents and royalties agreed to be paid on the coal mined should be a lien on the leasehold, fixtures, and improvements thereon and on the personal property of the lessee, and on the coal mined and the coke made on the premises. There was subsequently attached on the leased premises in a sheet iron building and on a concrete foundation constructed therefor an engine and a generator. The bolts holding these machines were embedded in the concrete and ran through holes prepared in the machinery and held by nuts; the machinery could be removed at a small expense. As between lessor and lessee these machines were trade fixtures and removable by the latter under the liberal rule of the lessee's right of removal where it would not cause any material injury to the estate, and the machines could be detached without losing their essential character or value as personal chattels.

Hart v. Appalachian Washed Coal Co. (Tennessee), 201 Southwestern 515, p. 516.

LIABILITY OF ASSIGNEE FOR ROYALTY.

A coal mining company that was not a party to a lease, admitted a transfer of the lease to it and that it undertook to operate the mine

under the lease, can not be permitted to accept only so much thereof as it desires and reject such portions thereof favorable to the lessor and made for his protection. The coal mining company as assignee of the lease became liable for the royalties or rents that were fixed by the lease.

Bruce Coal Co. v. Bibby (Alabama), 77 Southern 545, p. 547.

MINIMUM ROYALTIES GUARANTEED—LIABILITY.

A coal lease provided for the payment of 7 cents per ton royalty for all coal mined. The lessee by the lease obligated himself to pay royalty for not less than 50 tons per day after four months from the date of the lease whether that amount of coal was mined or not, and at the end of each month if an amount equal to the royalty on 50 tons per day at 7 cents per ton has not been paid the lessee should make good the shortage. The lease contemplated active mining operations after the expiration of four months and the lessee guaranteed a daily output of a minimum amount of 50 tons per working day during the life of the lease unless sooner terminated by exhausting the merchantable and minerable coal. The lessor was guaranteed that he should receive an income monthly equal to the royalty of 7 cents upon 50 tons per day, whether that amount was mined during the month or not and the payments were to continue either until the term of the lease expired or the coal was sooner exhausted.

Bruce Coal Co. v. Bibby (Alabama), 77 Southern 545, p. 546.

MINIMUM ROYALTY—ANNUAL PAYMENTS.

A coal-mining corporation leased a tract of coal lands and agreed to mine out all the coal within a period of 12 years beginning April 1, 1901. The lease provided that the lessee should pay for the year ending March 31, 1902, "the aggregate sum of at least \$3,000, whether said lessee mines during said year ending March 31, 1902, 50,000 tons of coal, mine run, or not"; and "that thereafter, that is to say, for the 10 years beginning with April 1, 1902, and ending with the 31st day of March, 1912, said lessee shall and will pay the lessor the aggregate yearly sum of \$7,500, whether said lessee mines in each year during said 10 years ending March 31, 1912, 125,000 tons, mine run, of coal or not"; and "that if at the end of any one or more of said 10 years it shall be found that said lessee has mined in that year more than 125,000 tons of coal, mine run, it shall at once pay to the lessor the royalty at 6 cents per each ton, mine run, on such excess." These provisions clearly indicate that each year's operations should, with respect to compensation, stand on its own feet. The parties chose while fixing a minimum limit to the amount of coal

to be mined yearly to fix the amount to be paid yearly in compensation for failure to reach that limit. The coal mining company elected to carry on the mining operations in one of two optional methods and to pay prices nominated in the lease. The company retained possession of the land up to the date of the trial of the case, mining coal continuously. This it could only do by compliance with the terms of the lease under which it claimed the right to carry on the mining operations.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 235.

SUBLESSOR'S RIGHT TO MINIMUM ROYALTY.

The lessee of a coal mine agreed to pay a royalty of 5 cents per ton on all coal mined. The lessee sublet the mine and by the terms of the sublease the sublessee agreed to pay a royalty of 7 cents per ton and bound himself to pay such royalty for 50 tons per day, after a certain stated time, whether that amount of coal was mined or not, and if an amount equal to the royalty of 50 tons per day at 7 cents per ton was not paid then the sublessee was to pay the shortage, payments to continue for the term of the lease or until the merchantable or minable coal was exhausted. The sublessor had the right to contract against any delay in mining which would deprive him of the benefit of his profit of 2 cents royalty on every ton. The sublessee was amply protected against the possibility of paying royalty on more coal than there was in the mine by complying with the lease in mining the requisite number of tons until the coal was exhausted. The payments of royalty would by the terms of the lease cease and terminate on the exhaustion of the merchantable and minable coal and this afforded the sublessee ample protection.

Bruce Coal Co. v. Bibby (Alabama), 77 Southern 545, p. 546.

ACTION ON BOND TO SECURE ROYALTIES—CONCLUSIVENESS OF RECEIPT— QUESTION OF FACT.

The Oliver Coal Company and the Maryland Casualty Company, as principal and surety, executed a bond to the Pittsburgh Block Coal Company to secure the performance of a lease of certain coal property and the payment of royalties upon coal mined therefrom. In an action on the bond the lessor claimed a large balance due for unpaid royalty on coal mined under the lease by the Oliver Coal Company. Liability was denied upon the ground that all royalties had been paid and depended for proof thereof on a receipt given by the lessor company. The receipt was not given to the mining company but was given to a trustee of the insurance company and by way of accounting for the distribution of that much of the sum. The receipt did not

purport to be in full for all royalties for coal mined at the time. Under the circumstances as shown the question of the conclusiveness of the receipt was one of fact for the jury.

Pittsburgh Block Coal Co. v. Oliver Coal Co. (Pennsylvania), 103 Atlantic 52.

LIEN ON FIXTURES—RIGHTS AS BETWEEN LESSOR AND SELLER.

A coal mining lease gave the lessor a lien on the leasehold and the fixtures, improvements, and personal property of the lessee to secure the payment of royalties. The lease provided that the lessee should surrender the premises with the improvements, fixtures, and machinery in good working order and gave the lessee the right to remove the property placed upon the premises by the lessee. After the execution of the lease the lessee purchased an engine and a generator and placed them on the leased premises on concrete beds fastened with bolts. The seller of the engine and the generator retained the title thereto to secure the payment of the purchase price therefor. The lessor as to the engine and generator stands only in the position of a prior mortgagee or lienee asserting a lien on subsequently acquired property of the mortgagor or lienor and could claim only such rights as his lessee acquired in the subsequently placed property, which is only an equity, assuming that the engine and generator can be removed without damaging the premises. As between the lessor and the seller of this machinery the seller's right to take possession of and remove the machinery either on failure to pay or on the termination of the lease was superior to that of the lessor.

Hart v. Appalachian Washed Coal Co. (Tennessee), 201 Southwestern 515, p. 517.

USE OF SHAFT PERMITTED—NO RECOVERY FOR USE.

The owner of a large tract of coal lands leased the same for mining purposes to a mining corporation owning and mining a small tract adjacent to that of the lessor. The mining corporation agreed to construct and provide a shaft, equipment, and switches at its own expense, but the lease provided that if all the coal in the lessor's land should be mined and removed, as required by the lease, and the provisions of the lease fully complied with, before all the coal was mined out of the mining company's own tract, then the lessee should have the right to continue to use the shaft in mining and removing the coal from its own tract for a certain stated time. The conventional relation created by the lease should end with the removal of the coal from the lessor's land subject only to the permission to the lessee to retain the possession of the shaft and equipment for the removal of its own coal. The fact that the shaft had been constructed and the plant installed at the expense of the lessee indicates the justness and

propriety of the provision, and no compensation to which the lessor may be entitled can be predicated upon the continued possession of the shaft by the lessee after the exhaustion of the coal in the lessor's lands.

Union Trust Co. v. Wear Coal Co. (Missouri), 199 Southwestern 230, p. 234.

OIL AND GAS LEASES.

CONSTRUCTION AND VALIDITY.

An oil and gas lease executed by a widow on lands that her husband owned in his lifetime is not invalid because her title depended on an instrument testamentary in character, duly acknowledged and recorded, and by the terms of which instrument the wife was to have the rent, and to use or occupy the same as long as she saw fit, and the instrument taken as a whole must be regarded as a will rather than a deed.

Colburn v. Simpson (Kansas), 170 Pacific 383.

CONSTRUCTION AND NATURE.

A landowner granted the oil and gas in certain described lands and gave the right to enter thereon to mine and market the same. The lease provided that in case no well was drilled within three months it should become null and void, unless the lessee thereafter paid quarterly in advance a specified sum as compensation in lieu of drilling within the succeeding quarter and for the use of gas produced and marketed from any well drilled. The lease reserved to the lessor one-eighth of the oil as royalty. Such an instrument does not constitute a grant of the oil and gas in place, but creates a modified form of lease or license to produce and market the minerals for the joint benefit of the lessor and lessee agreeably with the terms, covenants, and conditions of the contract.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

CONSTRUCTION—LESSEE'S OPTION TO SURRENDER—RIGHT OF LESSOR.

An oil and gas lease, for the nominal sum of \$1, granted to the lessee the oil and gas under the described premises with the right to enter thereon for the purpose of drilling and operating for oil or gas and to erect, maintain, and remove all buildings, structures, pipes, pipe lines, and machinery necessary for use in the operations. The lease expressly provided that the lessee might at any time remove all his property and reconvey the premises and thereby the agreement should be null and void. Under the provisions of the lease there was no obligation upon the lessee either to drill or pay rent, but the doing

of either was entirely optional with the lessee, and as the lease conferred on the lessee the right to surrender the premises and remove all his property at any time without further obligation on his part, a corresponding right exists on the part of the lessor to compel a surrender.

Melton v. Cherokee Oil & Gas Co. (Oklahoma), 170 Pacific 691, p. 693.

CONSTRUCTION—ORAL AGREEMENT AS TO PAYMENTS—STATUTE OF
FRAUDS.

An oil and gas lease was negotiated by several lessees and was made to one of them for the benefit of all. By an agreement among all the one to whom the lease was made advanced the purchase price, and the others on demand paid their respective shares. The claims and interests of the other beneficiaries in the lease can not be defeated on the ground that the transaction amounted to an oral contract for the sale of an interest concerning lands under the statute of frauds. It is not a case where one lessee purchased the lease and agreed to sell his interest to the others; but the original transaction was participated in by all, and the title was taken by one for the benefit of all, and in such case the statute of frauds has no application.

Aaron v. Rothrock (Kansas), 169 Pacific 1161.

VALIDITY—PERPETUITIES.

A lease granting the oil and gas in land with the right to enter thereon to mine and market the same with a provision that in case no well is drilled within three months the lease shall become null and void unless the lessee thereafter pays quarterly in advance a specified sum as compensation in lieu of drilling within the succeeding quarter and for the use of gas produced and marketed from any well drilled, is not void as creating a perpetuity.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

RIGHT OF LESSEE TO POSSESSION.

An oil and gas lease giving the lessee the right for 10 years to explore for oil entitles the lessee to the possession of the leased premises for the purpose of exploration.

Beatty Oil & Gas Co. v. Blanton, 245 Federal 979, p. 981.

RIGHT OF LESSEE TO SPECIFIC PERFORMANCE.

By the terms of an oil and gas lease it was entirely optional with the lessee to drill and develop the premises or to pay a certain stated amount. The lease also provided that the lessee could at any time re-

move all of his property and reconvey the leased premises and thereupon the lease should be null and void. Subsequently and on the failure of the lessee either to drill or to pay the lessor, the owner leased the lands to other persons for oil development and the original lessee brought suit against the lessor and the second lessees to cancel the subsequent lease and to enjoin the defendants from drilling for oil upon the premises. The relief sought by the complainant was in the nature of a decree for specific performance of a lease containing a surrender clause giving the lessee, the complainant, the option to terminate it at any time. Such a lease is not certain, fair, and just in all its parts. The complainant had not himself performed the contract on his part and had not placed himself in a position where he could be compelled to perform. A surrender clause in an oil and gas lease giving to the lessee an option to terminate the lease at any time deprives the lessee of the right to specific performance, unless and until he has performed the contract or placed himself in such a position that he might be compelled to perform the same on his part.

Melton v. Cherokee Oil & Gas Co. (Oklahoma), 170 Pacific 691, p. 694.

INTEREST OF LESSEE—NATURE OF OIL AND GAS—APPORTIONMENT OF ROYALTIES.

Under an oil and gas contract giving the privilege of drilling and developing the land for oil, until severance takes place, the lessee has no title and on severance and not earlier when the royalty in oil is payable. At that time the oil or gas is personal property after alienation or disposition of which no deed or other solemn instrument of conveyance is necessary but it is personal property in the hands of the lessee and he has bound himself to deliver a portion of it called royalty to the lessor as rent in kind for occupation, use, and operation of the lessor's mines. The royalty is a rent susceptible of division as if it were a rent payable in money. While the lease does not actually pass title to the oil or gas, it confers a right to take it, and where there is a severance of or a partition of the leased lands, the divided tracts go into the hands of their owners subject to such right, whether they are acquired by deed, will, or a decree of partition.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 743.

DEATH OF ANCESTOR—RIGHT OF HEIRS ON PARTITION—EFFECT OF PARTITION ON LESSEE'S RIGHTS.

On the death of a lessor of an oil and gas lease the leased lands descended to his heirs burdened by the right of the lessee and he is complete master of the situation as to the oil and gas, having the right to drill where he chooses on the leased premises and a partition

of the lands among the heirs in no way affects the lessee's right or liberty in that respect. A lease on a single tract of land subsequently broken into several subdivisions by partition is not segregated and converted into as many distinct leases as there are subdivisions. That could be done only with the consent and cooperation of the lessee, but as to him the lease and its subject, the tract of land, are entireties, and after as well as before partition there is one lease of one tract yielding, when productive, one royalty or rental in the aggregate. The rent or royalty is an entire thing arising out of the whole tract of land, and although the royalty oil or gas rental comes from certain wells does not legalize the rent or return of the wells or of the severed tract of land on which they are located, but it is the return of the whole tract covered by the lease. In legal contemplation the wells are not drilled on the several portions as under the lease on that portion, but they are drilled under the lease as made, which binds and holds all the parties after division as it did before.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 741.

PARTITION OF LEASED LANDS—RIGHTS OF SEPARATE ALLOTTEES.

Where on the death of the lessor of oil and gas lands the leased lands have been partitioned among the heirs of the lessor, it would be flagrantly inequitable to permit the lessee and the owner of one parcel of the divided land to irrevocably tie up all the other parcels and drain the oil and gas out of them. The subdivisions may be small and often are, so one or two wells on one part would completely drain the others and their owners are powerless to prevent it by drilling or in any other way and are precluded from any share in the royalty. Though their lands are burdened with a lease by virtue of which their minerals are taken away, they are denied all benefit. This theory makes the lease a burden on all the subdivisions for the benefit of the one on whose part the wells are drilled. Operations of wells on his part may constitute the vital and controlling condition of the lease and make it bind other subdivisions without the drilling of any wells thereon or the payment of either rent or royalty to the owners thereof. They can neither drill on their lands, force the lessee to do so, or cause it to be done by anyone else, but are bound hand and foot for the benefit of the lessee and the owner of the subdivision on which he sees fit to put his wells. Such an unjust rule should not be adopted but the rule of apportionment of rents or royalties treats the leased land as an entire thing and divides the rent or royalty among the assignee or reversionman, as the land is divided, according to the relative value of the parts, and not with reference to which each part produces. If the lease did not bind all the land and the drilling on one tract released the balance then

there would be no action for an apportionment of the rent or royalty, but since it binds all there must be an apportionment of the benefits to prevent the existence of a grievous burden without any reciprocal benefit.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 742.

LEASEHOLD REVERSION—ROYALTIES—RIGHT OF WIDOW.

Where the lands of which the husband died seized was subject to a valid oil and gas lease at the time of his death, yielding a rental, the widow is dowable of the reversion and the rent or royalty as an incident of the reversion.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 744.

DEATH OF LESSOR—DOWER RIGHTS.

The owner of land leased the same for oil and gas purposes and died before any wells were drilled. Partition was had of the leased land and dower lands assigned to the widow and to other heirs, respectively, and subsequently drilling operations were commenced and numerous producing wells drilled. In such case the wells drilled by the lessee on the portion of the land assigned to the widow as and for her dower are not mines or wells worked by her, since the working-right is held by the lessee even though they may be deemed mines opened in her husband's lifetime, and she is not entitled to the entire royalties and rents accruing from such wells nor is her dower right limited to such royalty and rents as subjects thereof. She is entitled to dower whatever its extent may be when the royalties and rents accrue from all the wells drilled on the entire tract of land covered by the lease.

Campbell v. Lynch (West Virginia), 94 Southeastern 739, p. 741.

PARTITION OF LEASED LANDS—RIGHT TO ROYALTIES.

A partition was made among cotenants of a tract of land on which there was a subsisting oil and gas lease executed by the ancestor in his lifetime, and there was an assignment of dower therein to the widow before any wells had been drilled on the leased premises. The decree for partition did not mention either the lease or the royalties or rents provided by it, and the pleadings on which the decree was founded were silent as to the lease and rights created by it. The decree under such circumstances does not extend to or include the royalties and rentals and the owner of each lot assigned therein is entitled to a proportionate share of all the royalties and rentals accruing from the wells drilled on the entire tract of leased land, subject to the widow's right of dower therein.

Campbell v. Lynch (West Virginia, 94 Southeastern 739, p. 741.

PAYMENT OF ROYALTIES BY CHECK OR DEPOSIT.

An oil and gas lease granted to the lessee the right for 10 years to explore for oil, with a covenant on the lessee's part to complete a well within 1 year or pay to the lessor at the rate of 10 cents per acre for each additional year that the completion was delayed, payments to be made quarterly in advance. The lease provided that the payment of rental should be by check, payable to the order of the lessor mailed to or deposited in a certain stated bank to the order of the lessor. By such arrangement the bank was constituted the lessor's agent to receive payment of the rental, and it was sufficient to make payment to the bank by check as well as to the lessor directly.

Beatty Oil & Gas Co. v. Blanton, 245 Federal 979, p. 980.

PAYMENT OF ROYALTY TO AGENT—FORFEITURE AVOIDED.

Under an oil and gas lease providing for payments of royalties quarterly in advance, by check or by deposit in a certain stated bank, the bank becomes the agent of the lessor to receive the payments of the royalties, and the receipt and acceptance of a check as payment by the bank, though made after due, is sufficient to prevent a forfeiture of the lease where the lessor, after receiving notice of the payment, did not repudiate it but acquiesced in it.

Beatty Oil & Gas Co. v. Blanton, 245 Federal 979, p. 981.

LEASE OF INDIAN LANDS—RECORD AS NOTICE.

The act of Congress of March 1, 1907 (34 Stats., 1026), provides that the filing of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice. The constitution of Oklahoma provides that all laws in force in the Territory at the time of the admission of the State into the Union not repugnant to the Constitution shall remain in force in the State until altered or repealed. This provision in the enabling act preserved the authority of the Government of the United States over the Indians, their lands, property, and other rights, and the Government still retains such right. An intention to repeal the existing Federal laws and regulations can not be gathered from the Oklahoma enabling act, reserving to the General Government the authority to make laws and regulations in the future respecting Indians. An oil and gas lease filed in accordance with the act of Congress of March 1, 1907 (34 Stats., 1026), is effectual to impart notice to all persons subsequently dealing with the lands therein described.

Scioto Oil Co. v. O'Hern (Oklahoma), 169 Pacific 483, p. 484.

TRUST CREATED BY PAROL—RIGHTS OF BENEFICIARIES.

An oil and gas lease was executed to one of several purchasers all of whom joined in paying the consideration, under an agreement that the one to whom the lease was made was to hold it for the benefit of all. Under such circumstances neither the trustee nor the purchaser from him with notice of his fiduciary relation can defeat the trust on the ground that it was not created or evidenced by writing even though it is assumed that a trust in relation to such a lease is one concerning real estate.

Aaron v. Rothrock (Kansas), 169 Pacific 1161.

TRUST—CREATION BY PAROL—VALIDITY.

The statute of Kansas provides that where a conveyance is made to one person and the consideration paid by another no trust shall ordinarily result in favor of the latter. The statute also provides that where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made or in whom title shall vest was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof, the provision against a resulting trust shall not apply. This latter principle applies to an oil and gas lease purchased by several but executed to one under a parol agreement that he was to hold the same as trustee for all, the payment for the lease being made by all the parties.

Aaron v. Rothrock (Kansas), 169 Pacific 1161, p. 1162.

RATIFICATION OF SALE OR LEASE BY TRUSTEE—RIGHTS OF BENEFICIARIES—ESTOPPEL.

A trustee who held an oil and gas lease for beneficiaries who contributed their part in the purchase of the lease, sold and assigned the same to a third person without the consent of the beneficiaries. A beneficiary who elected to hold the trustee personally responsible for his interest in the lease thereby ratified the sale and is estopped from recovering from the purchaser and assignee of the lease any interest therein.

Aaron v. Rothrock (Kansas), 169 Pacific 1161, p. 1162.

DUTY OF LESSEE TO DEVELOP AND OPERATE WELLS—CONSIDERATION.

The fact that a condition subsequent in an oil and gas lease or conveyance has been complied with by the production of oil within the time specified, does not end all obligations on the part of the grantee or lessee, where the only consideration moving to the grantor,

other than a one-eighth interest in the oil which might be produced and saved, was \$5. The parties to the grant did not regard the money named as the real consideration, but indulged the hope and expectation that oil in paying quantities would be found beneath the surface of the land, and when so found, the one-eighth portion delivered in the pipe line was to constitute the real consideration for the grant. This being the intention of the parties, it was the duty of the grantee or lessee to operate the wells continuously in the manner contemplated by the undertaking. The provision of the lease making it the duty of the grantee to deliver to the grantor in a pipe line his share of the oil, and to pay therefor suggests the intention of the parties, and it can not be claimed that the provision contemplated the operation of the wells at the will of the grantee any more than that the right to operate by the grantee could be divested at the will of the grantor.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 689.

IMPLIED COVENANT TO DEVELOP.

Under an oil and gas lease that is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands and reasonably protect the lines.

Alford v. Dennis (Kansas), 170 Pacific, 1005, p. 1007.

If it can not be said that the duty to develop continuously and produce the land's mineral resources in a reasonably diligent manner, after discovery thereof in paying quantities, is not expressly provided for by the terms of a lease or grant, then such duty unquestionably arises by implication. Such implication arises upon the provision in a lease reserving to the grantee the right of ingress and egress over the surface land; the right to lay pipes for both production and transportation of all minerals when discovered and produced, and the duty imposed upon the grantee to deliver to the grantor in a pipe line his share of oil and to pay for the same quarterly.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 689.

IMPLIED COVENANT TO DEVELOP—BREACH AND REMEDY.

An oil and gas lease, covering two tracts of land, was for a term of 10 years and as long as oil or gas might be found in paying quantities. The lease required the lessee to pay royalties on all paying wells and to commence operations within six months and to complete three wells before a stated date, with a provision "that no other or additional expense shall be incurred under this lease." The larger

tract was developed and many wells drilled thereon, but in nearly 14 years nothing was done toward drilling or developing the smaller tract. The assignee of the lessor, a grantee of the undeveloped tract, brought suit to cancel the lease on the ground of a breach of an implied covenant to prospect and develop the leased lands, but without previous demand on the lessee to drill on this tract. The rule that equity will not relieve against an improvident bargain prevents an absolute forfeiture, and equity will not forfeit a contract for the mere breach of one of its implied covenants, but the court under such circumstances must give the landowner some redress either in damages, if these be ascertainable, or in the alternative that the lessee be required to drill and develop the land in a reasonable time pursuant to the implied covenant under penalty of forfeiture.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1007.

IMPLIED COVENANT TO DEVELOP—NO FORFEITURE.

Equity will rarely arbitrarily declare the forfeiture of an oil and gas lease for a breach of an implied covenant. It will never so do where less drastic redress will satisfy the demands of justice.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1006.

IMPLIED COVENANT TO DEVELOP SEPARATE TRACTS.

An oil and gas lease covering two separate tracts of land obligated the lessee to drill three wells prior to a stated subsequent date and contained a provision to the effect that "no other or additional expense should be incurred." This clause is susceptible of restriction to the acknowledged obligation to drill the three wells prior to the stated date. It can not be said that the clause exempted the lessee from developing one of the separate tracts to any extent or at any time. If the separate undeveloped tract was not to be developed sometime there was no reason to include it in the lease, and standing as it does it is of no value to the lessee. Unless the lessee had a bona fide intention to prospect and develop this separate tract he had no proper purpose in leasing it and a cancellation of the lease would do him no injury. Equity abhors forfeitures, but it likewise abhors injustice. The lessor's lands are burdened with an oil and gas lease and he is entitled to have his land prospected for oil and gas within a reasonable time.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1007.

DUTY TO DEVELOP—INTENTION OF PARTIES.

An oil and gas lease for certain described lands provided that if oil is found in paying quantities in the first well the lessee should

within 30 days from its completion begin the boring of a second well on some other acre of the leased tract "and continue to bore additional tracts therein leased as developments may justify until at least five or six wells have been completed or the acre upon which said second party has failed to drill reverts to the first party by written notice to that effect." The leased tract was laid off or was treated by the parties as being laid off in acre blocks and it would appear that the drilling was intended to be by the acre. The lease is ambiguous as to whether it requires a well to be drilled on each acre and not merely two on different acres and three more any place upon the leased premises. Under such ambiguity the question should be submitted to a jury as to the intention of the parties in this respect.

Kirlicks v. Texas Co. (Texas Civ. App.), 201 Southwestern 687, p. 690.

IMPLIED COVENANT TO DEVELOP—SUIT AS A DEMAND.

A landowner who leased his land for the production of oil and gas, but without any provision for a minimum amount of development work, can not forfeit the lease even for complete failure to develop for a long period of time, for such a breach of the implied covenant to develop. But on failure of the lessee to develop the landowner may demand that development work be commenced within a reasonable time and prosecuted with reasonable diligence or the lease will be forfeited. The commencement of a suit to forfeit the lease for failure to develop is a sufficient demand and on a proper showing the court may render an alternative decree to the effect that development work shall be begun within a reasonable time and prosecuted with reasonable diligence or that the lease shall be forfeited.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1007.

FAILURE TO REQUIRE DEVELOPMENT.

It is improvident for a landowner to grant an oil and gas lease on a tract of land for a long term without providing that a certain minimum of work should be done on the leased lands. But it is not in his province to end a contract merely because it is a bad bargain. It is not the intention under such a lease that the land should be held indefinitely without development, and a landowner may have some redress in damages for breach of the implied covenant where "it was the intention of the parties to the lease" that the leased premises should be drilled and explored for oil and gas and not held indefinitely without exploration.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1006.

DUTY OF LESSEE TO DEVELOP—CANCELLATION ON FAILURE.

A lessee in an oil and gas lease can not indefinitely hold a lease without operations to render the land valuable by the production of the minerals which the lease authorizes him to mine and market for the joint use and benefit of the lessor and lessee, according to its terms and covenants; but if he negligently fails or refuses, when notified to proceed with developments to inaugurate within a reasonable time thereafter and diligently prosecute such drilling operations as may reasonably be deemed necessary or sufficient to test the land for these minerals, equity will grant relief by cancellation upon application therefor by the lessor.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

SEPARATE LEASED TRACTS—FAILURE TO DEVELOP ONE—REMEDY.

Where two separate tracts of land are leased under one oil and gas lease and the lessee has prospected and developed one of the tracts only, equity will not cancel the lease on the undeveloped tract, but it will not permit the lessee, without consideration, to hold the lease indefinitely for speculative purposes to the prejudice of the interests of the lessor.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1006.

COVENANT TO DRILL—LESSOR'S OPTION—CANCELLATION.

Where the lessor desires to enforce the covenant to drill in an oil and gas lease he must first demand performance of or compliance with the covenant, and if within a reasonable time after such demand the lessee fails and refuses to develop the land as contemplated by the lease, equity will at the suit of the lessor grant relief by cancellation.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

FAILURE TO OPERATE—LIABILITY FOR DAMAGES.

In an action by an assignee of an oil lease against the lessee for damages for failure to produce oil as required by the lease, the recovery of damages by the assignee as for the oil that should have been produced must be limited to the period from the date of the acquisition of an interest in the lease by the assignee, to the time when the leased lands were taken possession of by the bankruptcy court because of the insolvency of another assignee of an interest in the lease, where the lessee made an effort to obtain possession of the land for

operations and attempted to obtain an order to operate the same under the direction of the bankruptcy court.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 691.

PAYMENTS IN LIEU OF DRILLING—RIGHT OF LESSOR TO HAVE LANDS DEVELOPED.

An oil and gas lease provided that on certain conditions it should become null and void unless the lessee pays quarterly in advance a specified sum as compensation in lieu of drilling within the succeeding quarter. Such a lease or agreement does not create a mere tenancy at will terminable at the option of the lessor or void as a perpetuity; but the lessor may require development after the end of any quarter for which the lessee has paid the agreed consideration for delay upon reasonable notice to the lessee; and in the event of the lessee's failure to drill within reasonable time after such notice, equity will cancel the lease upon application by the lessor.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

ACCEPTANCE OF RENTALS—WAIVER OF COVENANT TO DRILL.

Payment of the stipulated sums quarterly in advance by a lessee as provided in an oil and gas lease and acceptance thereof by the lessor, without protest or complaint, and without a demand to drill within a reasonable time after the termination of a quarter for which payments were made and accepted, operates as a waiver of the covenant to drill within such quarter.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

ABANDONMENT BY LESSEE—AVAILABLE TO ASSIGNEE OF LESSOR.

Abandonment as applied to an oil lease is the relinquishment of a right for the period of years stated to remove minerals or oil from beneath the land described. If such a right is in fact relinquished during the ownership of the lessor, it is none the less so when the lessor conveys the land to another, as the right so lost can not by mere transfer of the property be revived.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 689.

ABANDONMENT BY LESSEE—RIGHTS OF CREDITORS AND OF LESSORS.

An oil and gas lease provided that upon failure of the lessee to drill or make the payments provided for, the lessor should have the right to declare a forfeiture. The lessee began operations, but be-

fore the well was complete became insolvent, permitted the lease to lapse, left the rig, tools, and appliances on the premises and abandoned the enterprise. The lessor, although he had not declared a forfeiture of the lease, is to be regarded as in possession and control of the property and he is a proper garnishee of the actions brought by the persons who performed the labor for the lessee.

Hamilton-Collinson Hdw. Co. v. Arkansas City Oil & Gas Co. (Kansas), 169 Pacific 190.

ABANDONMENT AND FORFEITURE—INTENTION.

When it is claimed that a right under an oil lease has been lost by abandonment and upon which forfeiture of the lease is sought the issue of intention is rarely if every absent. An intention to abandon is to be found by a jury from a consideration of the nature and extent of the undertaking, the conduct of the parties, and what they did do or failed to do in that respect. The rule does not mean that the jury shall find that a specific mental reservation was reached by the person so charged to so abandon the right, as such a finding could never have a basis in the testimony except by admission or confession.

Munsey v Marnet Oil & Gas Co. (Tex. Civ. App.), 199 Southwestern 686, p. 690.

FORFEITURE—RIGHT TO DECLARE.

A provision for forfeiture in an oil and gas lease is for the benefit of the lessor and is more strictly enforced than the ordinary lease between landlord and tenant; but it is not a rule of universal application that all defaults made by the lessee entitle the lessor to declare a forfeiture or have a decree canceling the lease. If a forfeiture is for nonpayment of money or the performance of some other act, equity regards such payment or performance as the real or principal intent, and the forfeiture merely as an accessory where time is not made of the essence of the contract and will not enforce such forfeiture where the actual damage sustained by the lessor can be adequately compensated.

Rembarger v. Losch (Ind. App.), 118 Northeastern 829, p. 833.

FORFEITURE—PLEADING—QUESTION OF FACT.

The lessee in an oil lease, in an action for the price of oil sold, included other lessees and persons interested, and claimed his right to recover by virtue of the terms of the lease, admitting that other parties were entitled to the royalty part of the oil and that the purchaser of the oil should be compelled to pay to the parties entitled to receive the same. Under such circumstances the lessee, under the

familiar principle can not question the title of the parties standing in the position of the lessor and can not as against them demand a forfeiture of the lease.

Kirlicks v. Texas Co. (Texas Civ. App.), 201 Southwestern 687, p. 690.

FORFEITURE ON GROUND OF ABANDONMENT.

In an action by an assignee of the lessor of an oil and gas lease to forfeit the lease on the ground of abandonment, all the facts and circumstances and the acts of the parties and their agents properly pleaded should be admitted in evidence and presented to the jury without limitation, for the reason that when the assignee acquired the land and interest of the lessor in the oil lease any rights inuring to the original lessor in like manner inured to the assignee. The lease expressly declared that its conditions should extend to the heirs, executors, administrators, and assigns of the lessor. If the lessee prior to the assignee's purchase of the land had in fact so acted as to satisfy the jury on the issue of abandonment such abandonment inures to the benefit of and could be asserted by the assignee of the lessor, or if the conduct of the lessee partly during the ownership of the lessor and partly during the ownership of the assignee of the lease was sufficient to satisfy the jury on such issue the assignee could rely thereon, as otherwise it might result that a complete abandonment had taken place and the right of forfeiture acquired, but because of the change of ownership the lessee could claim a right wholly lost.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 688.

FAILURE TO DEVELOP—FORFEITURE.

The failure to market the product of one gas well and to proceed with reasonable diligence to prospect for and develop others is insufficient to summarily forfeit the lease, but may be the basis of an action for damages and have a court of law to determine whether there was an adequate remedy at law for failure to develop. In such a case a court may enter an alternative decree, upon proper proof, to the effect that the lessee should proceed within a reasonable time to develop the property, or failing therein that the lease should be canceled.

Alford v. Dennis (Kansas), 170 Pacific 1005, p. 1006.

An oil and gas lease containing a stipulation on the part of the lessee to commence operations on the premises within one year from a stated date or pay for the delay, gives the lessee an option to drill or pay, and on the lessee's failure to do either the lessor may, at his option, forfeit the lease.

Melton v. Cherokee Oil & Gas Co. (Oklahoma), 170 Pacific 691, p. 693.

FAILURE TO OPERATE WELLS—ABANDONMENT AND FORFEITURE.

A failure to operate wells for a given period under an oil lease might or might not furnish a basis for a finding that an intention to abandon was established by such failure depending upon what brought about the cessation of operations, or cessation for a period might afford no basis whatever to support such a finding. Whether the cessation of operations was temporary, was excusable, or evidenced an intention to abandon the right secured by the lease was for the jury to determine under appropriate instructions by the court in an action to forfeit an oil lease on the ground of abandonment.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686. p. 690.

FORFEITURE—ERRONEOUS INSTRUCTION AS TO RIGHT OF FORFEITURE.

It is error for a court to instruct a jury in an action to cancel or forfeit an oil and gas lease to the effect that the law looks with disfavor upon and discourages the forfeiture of rights of parties, and declares that before a forfeiture will be decreed the evidence on which the forfeiture is predicated must preponderate in favor of the forfeiture. The general rule of law as stated by the court in an instruction does not apply where the grant is in the hope and expectation of pecuniary profit from mineral development. In such cases the rule that equity abhors forfeitures does not apply for the reason that forfeitures when the lessee is guilty of laches is in that respect but equity.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686. p. 688.

FORFEITURE OF LEASE—ORDINARY CARE.

In an action to forfeit an oil lease for the failure of the lessee to develop there can be no application of the doctrine of "ordinary care" on the part of the lessee where the lease expressly imposed upon the lessee the obligation to continuously operate the wells.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686. p. 690.

DECLARATION OF FORFEITURE—TENDER OF STIPULATED COMPENSATION.

An oil and gas lease provided that the lessee should pay quarterly in advance a specified sum as compensation in lieu of drilling within the succeeding quarter. The lessee paid and the lessor accepted the quarterly payments in lieu of drilling for a period of 16 years. Under such circumstances the lessor can not declare and enforce a forfeiture for a failure to drill where he made no demand and gave

no notice to the lessee to develop the land at the time of the acceptance of the last quarterly payment, and a declaration of forfeiture for such cause will excuse the failure of the lessee, who continued to tender the stipulated compensation thereafter, to exercise the right to enter and drill wells while the lessor evinces an intention to treat the lease as forfeited.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

INTEREST OF LESSOR—FORFEITURE.

An oil and gas lease in the first instance usually grants to the lessee merely the right to explore for oil and gas, but if the exploration and development is made in accordance with the terms of the lease, and oil or gas is produced thereby as provided by the lease, the lessee acquires an interest in the land. And when an interest in real estate has thus been acquired by a lessee it will not be forfeited unless it clearly appears that it would be against equity to permit the lessee to longer assert such interest.

Rembarger v. Losch (Ind. App.), 118 Northeastern 829, p. 833.

FAILURE TO PAY ROYALTIES—FORFEITURE OR CANCELLATION.

To entitle a lessor of an oil and gas lease to equitable relief by way of forfeiture or cancellation of a lease after the lessee's failure to make the stipulated payments, it must appear that there is not an adequate remedy at law by a suit for damages; and the burden is upon the complainant, the lessor, to establish an absence of such remedy when relief is sought in equity.

Rembarger v. Losch (Ind. App.), 118 Northeastern 829, p. 833.

FORFEITURE—WAIVER.

A person entitled to the forfeiture of an oil lease and the consequent right of reentry may waive such right or be estopped by his own conduct from asserting the right. And any fact properly evidencing the intention of a lessor to waive any right of forfeiture is admissible in an action by an assignee of the lessor to forfeit the lease.

Munsey v. Marnet Oil & Gas Co. (Texas Civ. App.), 199 Southwestern 686, p. 690.

FAILURE TO DRILL—FORFEITURE—WAIVER BY LESSOR.

The lessor in an oil and gas lease providing that in lieu of drilling the lessee may pay quarterly in advance a specified sum as compensation in lieu of drilling in the succeeding quarter, can not, after accepting the quarterly advance payments during a period of 16

years without protest or demand to drill at the end of the last quarter for which he accepted compensation in lieu of drilling, declare an immediate termination and forfeiture of the lease because of delay in performing the covenant to drill.

Johnson v. Armstrong (West Virginia), 94 Southeastern 753, p. 755.

ACCEPTANCE OF RENTALS—FORFEITURE—ESTOPPEL.

The owner of land, by an oil and gas lease, sold to the lessee all the oil and gas under certain described lands. The lessee was to pay one-eighth of the oil produced and \$200 per annum for gas, and drilling was to commence within one year and be prosecuted with due diligence. The lessee might prevent a forfeiture by paying to the lessor a certain stated amount per quarter for three years, but the commencement of a well should operate as full liquidation for all rentals. That payments were made, and subsequently a well at large expense was drilled, but the gas was not sufficient to market. That thereafter the lessee made two annual payments and tendered a third, which the lessor refused to accept on the ground that the lease was no longer in effect. Under these circumstances the acceptance of the payments for rent, the failure of the lessor to declare the lease ended and save the lessee from the useless expenditure of a large sum for drilling the gas well, and the acceptance of the annual compensation for his share of the gas produced had the effect of lulling the lessee into the belief that his dereliction in punctually carrying out the lease had been condoned: and neither the lessor nor his heirs can recall such acts to the prejudice of the lessee, and they are estopped from attacking the validity of the lease.

Dellinger v. Smith, 142 Louisiana, 77 Southern 947.

FRAUD—CANCELLATION.

An oil and gas lease may be declared invalid and fraudulent and canceled on the ground of fraud where it was procured by the lessee falsely and fraudently misrepresenting to the complaining tenant in common that the other tenants in common had leased the land to him for oil and gas purposes, and by fraudently presenting to the complainant a pretended lease executed by the other tenants in common and by falsely representing that the other tenants in common had in fact executed the lease for their interest in the land, when in truth and in fact no such lease had been executed, and that the pretended lease was in fact false and was invented by the lessee for the purpose of deceiving and inducing the complainant to execute a lease covering her interest in the land.

Dieterle v. Harris (Oklahoma), 169 Pacific 873, p. 874.

INDIAN LANDS—APPROVAL OF LEASE.

A full-blooded Creek citizen executed an oil and gas lease upon his allotted land and the lease was filed in the office of the United States Indian agent, Union Agency, Muskogee, Indian Territory. The Indian lessor died before its approval by the Secretary of the Interior, and the heirs of the lessor thereafter conveyed the leased land by deed duly approved by the county court, after which the lease was approved by the Secretary of the Interior. The approval relates back to the date of the lease, and the grantors in the deed by the heirs of the Indian lessor took their title subject to the lease.

Scioto Oil Co. v. O'Hern (Oklahoma), 169 Pacific 483, p. 485.

WRITTEN LEASE—APPROVAL BY SECRETARY.

The act of April 26, 1906 (34 Stats., 145), requires that all leases and rental contracts except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads of full-blooded allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and shall be subject to approval by the Secretary of the Interior. Under this act an Indian oil lease can have no validity without the Secretary's approval. The protection of the Indian's right is left to the Indian Bureau, of which the Secretary is the head, and the court may only interfere to protect the rights of others when they are invaded by clearly unauthorized action. The approval rests in the exercise of the Secretary's discretion. This authority was given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. The law gives the Secretary the power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate. Such a lease has no validity without the Secretary's approval.

Anicker v. Gunsburg, 38 Supreme Ct. Rep. 228, p. 230.

LEASE OF INDIAN LANDS—APPROVED BY MISTAKE OF LAW—TRUST.

A lessee in an oil and gas lease given by a Creek Indian filed a bill in equity for relief and to charge the defendant oil company as trustee upon the theory that the lease to the defendant company had been approved by the Secretary of the Interior by mistake of law; and that, but for the mistake, the lease of the complainant would have been approved, and for such reason the defendant oil company is a trustee for the complainant and should be required to assign the lease to him. To maintain the action the complainant must establish not

CONSTITUTIONAL PROVISIONS—NOT SELF-EXECUTING.

The constitutional provisions of Utah relating to the taxation of mines and mining claims and the net annual proceeds of mines are not self-executing, but laws have been enacted and amended from time to time supplementing these constitutional provisions.

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

MINING PROPERTY—TAXATION OF SURFACE.

The constitution of Montana (Art. XII, sec. 3) and the constitution of Utah (Art. XIII, sec. 4) provide for the taxation of mining property and provide also that in case the surface ground, or any part thereof, is used for other than mining purposes, it shall be taxed at its value for such other purposes. In the estimation of the constitutional conventions the surface would have no value except when it would be in condition to produce profit and that such other value as it might derive from its use as residential, manufacturing, and agricultural purposes must be ascertained as if it were real estate and added to the purchase price of the claim.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 55.
Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

TAXATION OF MINING MACHINERY—SURFACE IMPROVEMENTS.

The constitution of Montana (Art. XII, sec. 3) and the constitution of Utah (Art. XIII, sec. 4) provide that all machinery used in mining and all property and surface improvements upon or appurtenant to mines or mining claims that have a value separate and independent of such mines or mining claims should be valued and taxed as improvements upon other property are, and the valuation and assessment are to be ascertained under the provisions of law applicable to other real property.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 55.
Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

TAXATION OF ANNUAL NET PROCEEDS OF MINES.

The constitution of Montana (Art. XII, sec. 3) and the constitution of Utah (Art. XIII, sec. 4) provide for the taxation of the annual net proceeds of all mines and mining claims. Provision was made for the taxation of the claim itself on the basis of the purchase price, taxation of the surface under certain circumstances, and taxation of mining machinery and surface improvements. As to the subsurface contents of the mine, the theory was adopted by the constitutional conventions that these should be regarded as having no

taxable value other than so far as they might add to the resources of the owner by the yielding of a profit. This clause was added which in effect makes an exemption of the contents of a mine from taxation so long as they should not prove a source of profit by being extracted and converted into personal property. This necessitates the devising a method of ascertaining the net profits and a mode by which their taxable value might be ascertained.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 55.
Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

CONSTRUCTION OF STATUTE—NET PROCEEDS.

The statute of Utah providing for the taxation of the net annual proceeds of a mine does not concern itself with costs or deficits that arise in any year except those incurred during the year in which the net proceeds are obtained. It is not a question whether or not the mine owner or operator gains net proceeds or net profits from his mine when considered as a business venture, but as applied to taxation the question is: Did the mine or mining property yield net proceeds for the particular year in which the assessment is made? It makes no difference whether the ores are obtained from the mine or a dump, if in fact they were at some time taken from the mine. A mine operator may lose money for a period of years, but if there is any one year in which the yield of the mine exceeds the deductions allowed by the statute the excess is subject to assessment and taxation as net proceeds for that year.

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78, p. 79.

NET ANNUAL PROCEEDS—METHOD OF REACHING.

A mining corporation conceded that its net proceeds for the year 1913 amounted in round numbers to \$43,000, with which sum it was assessed for taxation. The mining company insisted that for the purpose of determining the net proceeds of the mine it had the right to show that from 1876 to 1890 it developed in operating its mine certain ores which were then of too low a grade to be profitably reduced and shipped but were placed in a dump, and in 1913, by a cheaper process of reducing ores, these low-grade ores were shipped and reduced at the profit stated; that it was entitled as against the alleged net proceeds of 1913 to show that the cost of mining the low-grade ores and placing them in the dump during the long period of time would more than counterbalance the apparent profit received from the ores in 1913, and that therefore there were no net proceeds to be assessed for that year. It is manifest that under the Utah statute, for the purpose of taxing the net proceeds of a mine, the cost

of mining incurred in any one year must be considered independently from the cost and expense incurred in any other year, and that only such costs and expenses as are incurred during the year in which the net proceeds are obtained may be considered.

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78, p. 79.

TAXATION OF PROCEEDS OF MINE—MEANING AND APPLICATION OF
“MINE.”

The constitution of Montana (Art. XII, sec. 3) and the constitution of Utah (Art. XIII, sec. 4) provide for the taxation of mines and mining claims purchased from the United States at the price paid therefor. Under certain circumstances the surface of such claims and the mining machinery and surface improvements are to be taxed separately. These sections also provide “and the annual net proceeds of all mines and mining claims shall be taxed as provided by law.” The expression “all mines,” as used in this clause was intended by the constitutional conventions to apply to all mineral deposits and put them in the category of personal property and the margin over and above the cost of extraction only to be taxed at a value to be ascertained by visual inspection or mathematical calculation. The expression is broad enough to include all mines, both those found in lands purchased from the United States under the mining laws and those obtained by grant or purchased under other laws. There is no reason to suppose that the convention gave careful attention exclusively to mines and mining claims purchased as such from the United States, omitting all consideration of those acquired by other modes. The convention knew that grants of land held by the Northern Pacific Railway Company included coal and iron. They knew that lands acquired by settlers under the homestead law and other laws were possibly underlaid with minerals. It is reasonable to suppose that by the use of the general language in this last clause the convention intended to include all mineral deposits and to declare that their taxable value should be their productive value after development. It is more reasonable also to conclude that the convention intended to classify mines as such rather than that it intended to classify them with reference to the law by which title was acquired. The term “mine” as used in the last clause of this section was not intended to be limited to the mines or mining claims purchased from the United States and the taxation of the net proceeds “of all mines” applies to mines wherever found or worked, without reference as to how the title to the land in which it is found has been acquired.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 56.

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

PURPOSE OF CONSTITUTIONAL PROVISION—DIFFICULTY IN MAKING VALUATION OF PROPERTY.

The provisions of Article XII of the constitution of Montana, including section 3 with reference to the taxation of mines and mining property, are designed to aid, not to prevent, the raising of public revenues. The mineral estate reserved as separate and distinct from the surface constitutes property with a value, taxable because not exempted, and the difficulty which might confront a taxing officer in ascertaining the value is no bar to the taxation of the mineral estate.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 58.

ASSESSMENT OF COAL LANDS.

The constitution of Utah (Art. XIII, sec. 4) provides that coal lands purchased from the United States shall be assessed at the price paid therefor. Sections 2 and 3 of the same article provide for the assessment of other property which includes coal lands not purchased from the Government at its actual value. These provisions are carried into the statutes (Compiled Laws of Utah, 1907, secs. 2504–2506). It is not a compliance with these constitutional and statutory requirements for an assessing officer to make a blanket assessment at a flat or uniform rate of all coal lands in any county of the State. It is a fact of which the courts take judicial notice that the coal lands purchased from the United States were not purchased at a uniform price per acre, and that the coal lands purchased from the State are not of uniform value. The assessment of all such lands at a uniform rate per acre is a flagrant disregard of the plain provisions of both the constitution and the statute.

Ririe v. Randolph County Assessor (Utah), 169 Pacific 941, p. 942.

RETURN OF PROPERTY FOR ASSESSMENT.

The statute of Utah (Laws, 1907, sec. 2566) and the amendment of 1909 require that all persons engaged in mining in that State must at a specified time in each year make certain statements under oath to the State board of equalization showing both the gross and net yield from their mines for the preceding year.

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

ASSESSMENTS FOR TAXATION—DEDUCTION OF EXPENDITURES.

The statute of Utah (Compiled Laws, 1907, secs. 2566, 2567, and 2568) requires all persons engaged in mining to make a statement under oath of the gross and the net yield from their mines for the preceding year. The statement must contain a true and correct

account of the actual expenditures of money and labor in extracting the ore, transporting the same to the reduction works, the reduction of the ore and conversion of the same into money during the year. In this statement of expenditures there must be allowed all money expended for necessary labor, machinery, and supplies used in the mining operations, for the improvements necessary in the workings of the mine, for reducing the ore, or for construction of mills and reduction works, for transporting the ore, and for extracting the metals and minerals therefrom: but only the money invested in the mines or improvements during the year immediately preceding the statement must be included therein. The expenditures shall not include salaries or sums paid to any person or officers not actually engaged in the working of the mine or personally superintending its management. The expenses that are permitted to be deducted from the gross yield are such only as were incurred during the year for which the proceeds are taxed. The statute leaves no room for construction respecting the time in which the expenses may be deducted from the gross yield of any mine in order to arrive at the net proceeds that are subject to assessment and taxation for any particular year. "The money invested in the mines or improvements during any year except the year immediately preceding such statement must not be included therein."

Mammoth Mining Co. v. Juab County (Utah), 170 Pacific 78.

SEPARATE ASSESSMENT OF OIL—ADDING TO THE AGRICULTURAL VALUE.

The addition to the agricultural value of the mineral value of land assessed based upon the quantity of oil produced is not a separate assessment of the mineral oil.

Palmer Co. v. Police Jury, etc., 142 Louisiana, 78 Southern 122. p. 123.

OIL LANDS—AGRICULTURAL AND MINERAL VALUATION.

The owner of valuable oil-producing lands furnished the assessor a statement showing only the agricultural value of the land, knowing it to be insignificant in comparison with the mineral value of the land. Such owner is estopped from complaining that the board of supervisors or board of review had to adjourn the meeting subject to call to allow the assessor an opportunity to obtain information which the landowner himself should have furnished regarding the mineral value of the land and in reassembling without notice to the landowner, especially where the owner does not contend that his lands were worth less than the amount of the assessments and where the evidence shows that they were worth much more.

Palmer Co. v. Police Jury, etc., 142 Louisiana, 78 Southern 122, p. 123.

MINING RIGHT—ASSESSMENT.

A conveyance of the right to mine, excavate, or remove coal underlying a tract of land is a conveyance of an interest in the land, and such a mining right is real estate to be assessed for taxation separately from the other part of the land.

Simmons Coal Co. v. Board of Review, etc. (Illinois), 118 Northeastern 753, p. 754.

LEASE OF RIGHT TO MINE COAL.

The revised statutes of Illinois (Hurd Rev. Stats. 1915-16, ch. 94) provide that any mining right, or the right to dig for or obtain iron, lead, copper, coal, or other minerals from land, may be conveyed by deed or lease, and when the owner of any land shall convey by deed or lease any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxable separately and any sale of the land for any tax or assessment shall not include or affect any such mining right.

Simmons Coal Co. v. Board of Review, etc. (Illinois), 118 Northeastern 753, p. 754.

CONVEYANCE OF SURFACE—RESERVATION OF MINERALS—VALUATION.

Where mineral land has been conveyed and the grantor reserved all the minerals and also the use of such surface ground as may be necessary for the exploring for and mining or otherwise extracting the minerals, the cash value of the land, omitting the deposit of mineral from the estimate, is to be ascertained for the purpose of taxation as if the entire estate was vested in the grantee and an equitable apportionment of this value made by the assessor between grantee and the grantor.

Northern Pacific R. Co. v. Musselshell County (Montana), 169 Pacific 53, p. 57.

TAX ON MINING CORPORATIONS—TIME OF LEVY.

The statute of New Jersey providing for the taxation of certain corporations (act April, 1884, P. L., p. 232), contains no express declaration as to the beginning or ending of the annual period which the tax is to cover. The tax is in the nature of a compensation to be paid by corporations for the enjoyment of their corporate privileges during an annual period. Neither the supplement of March 17, 1892 (P. L., p. 126), nor the supplement of February 19, 1901 (P. L., p. 31), fixes a definite date nor changes the date fixed by the original statute of 1884, and as that act went into effect on April 18, the import is that the 18th day of April of each year marks the beginning

of the yearly period for which the corporation fee or tax is charged. Under this rule a corporation can not be prevented from making a voluntary dissolution on March 19, 1917, on the ground that the taxes for that year remain unpaid.

Old Dominion Copper Mining & Smelting Co. v. State Board of Taxes and Assessments (New Jersey), 103 Atlantic 79, p. 80.

TAXATION ON COAL LANDS—MANDAMUS TO COMPEL OFFICER TO ACT.

A taxing officer who has violated the plain provisions of the constitution and of the statute in making assessments and valuations of coal lands can not be compelled by mandamus to properly assess such lands after the assessments have been completed, the taxes equalized, the rate established, the funds apportioned, and the assessment roll has passed entirely beyond the control of the taxing officer.

Ririe v. Randolph County Assessor (Utah), 169 Pacific 941, p. 942.

ISSUANCE OF TAX DEED—INJUNCTION.

An injunction may be granted to restrain the issuance of a deed to the purchaser at a tax sale of minerals reserved on the sale and conveyance of the surface of certain lands, where no mine had been opened or operated and where there had been no net proceeds from any mine upon the land, but the assessment of the mineral reservation had been made at a certain arbitrary sum per acre. An injunction is not to be denied on the ground that the owner of the mineral has not paid or offered to pay the part of the tax that was legal where the legal and the illegal portions can not be separated and the legal part can not be ascertained and paid.

Northern Pacific Railroad Co. v. Musselshell County (Montana), 169 Pacific 53, p. 57.

QUARRY OPERATIONS.

NEGLIGENCE OF OPERATOR—INCOMPETENCY OF FOREMAN.

An experienced powder man in a granite quarry set off a blast in three holes in a sheet of granite. By the blast the stone was separated from the quarry to some extent, leaving a seam between the solid wall and the stone intended to be removed. After the blast the foreman examined the result and ordered the powder man to make a seam blast. While the powder man was engaged in making the seam blast and inspecting the tamping and the powder to see if the exploder was all right the stone, being on an incline or slope, moved and the powder exploded, causing the injuries complained of. The complainant alleged the negligence of the operator in not furnishing him with a safe place in which to perform his duties and in not furnishing him with a competent fellow servant. The proof shows that the foreman had worked for the operator for a long time and had never been guilty of negligence or incompetency before, and there was nothing tending to show any circumstances in connection with the alleged negligent act in failing to make proper inspection from which it could be inferred that the foreman was incompetent, and in such state of the evidence it was error to submit the question of the foreman's incompetency to the jury as it confused the real issue in the case.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

OPERATOR'S KNOWLEDGE OF DANGEROUS CONDITION—NEGLIGENT ORDER TO EMPLOYEE.

If by an inspection made by a foreman in a quarry the operator knew, or in the exercise of due care ought to have known of the dangerous condition existing, and then ordered an employee to make a seam blast, the employee not having knowledge of such dangerous condition equally with the operator, the operator is liable for injuries resulting to the employee.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

NEGLIGENCE OF FOREMAN—FELLOW SERVANT RULE NOT APPLICABLE.

A foreman in a quarry was acting as and for the operator in making an inspection of the quarry after a blast and in giving an order to a powder man to make a seam blast. In such case the foreman is not a fellow servant of the powder man and the fellow-servant rule is not involved.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

DUTY OF OPERATOR TO INSPECT—QUESTION OF FACT.

By a blast in a stone quarry the stone was separated from the quarry to some extent, leaving a seam between the solid wall and the stone intended to be removed. After the blast was fired the quarry foreman went to the place of the blast, examined the result of the blast, and ordered an employee to make a seam blast, and to hurry, as the men were waiting for it. The foreman inspected the situation, and on such inspection gave the order to make the blast. Under the circumstances it was a question of fact for the jury whether, under proper instructions by the court, it did not devolve upon the operator to make a reasonable inspection of the situation before ordering the second blast.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

DUTY OF OPERATOR TO INSPECT—ASSUMPTION OF DUTY PERFORMED.

Where it is the duty of a quarry operator to inspect the condition after a blast in the quarry, an employee is justified, in the absence of knowledge or information to the contrary, in assuming that the operator has performed his duty fully in this regard and to rely upon it without inspecting for himself.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

DUTY OF EMPLOYER—RISKS NOT ASSUMED BY EMPLOYEE.

An employee in a quarry does not assume the risk until after the operator has exercised ordinary care to furnish him a reasonably safe place and safe appliances in which and with which to work. An employee does not assume risks until the employer has used reasonable care to avoid them.

Pringle v. Carthage Quarry Co. (Mo. App.), 199 Southwestern 561, p. 563.

ASSUMPTION OF RISK—PLEADING AND PROOF.

In an action for the death of an employee while working in the line of his employment in a quarry, the employer may prove the defense of assumption of risk under the general denial.

Pringle v. Carthage Quarry Co. (Mo. App.), 199 Southwestern 561, p. 562.

RISKS NOT ASSUMED.

An employee in a quarry did not assume a danger that was created by the act of his employer in exploding dynamite which the employer knew was likely to throw rocks to the place where the employee was killed, when the employer knew of the employee's position.

Pringle v. Carthage Quarry Co. (Mo. App.), 199 Southwestern 561, p. 563.

DANGEROUS CONDITION—DUTY TO WARN EMPLOYEE.

An employee acting as a powder man in a quarry has a right to depend upon the operator, he being present by his agent, a foreman, directing the work, and the powder man has the right to presume that the operator, through his agent or foreman, would warn and save him from needless exposure to injury.

Barclay v. Wetmore-Morse Granite Co. (Vermont), 102 Atlantic 493, p. 495.

INJURY TO EMPLOYEE—OPPORTUNITY TO REACH PLACE OF SAFETY.

In an action for the death of an employee in a quarry caused by his being struck by rock thrown by an explosion, if the shot was fired when the employee was driving his team with his back to the shot or before he had time to make observations for his safety after he stopped his team and the foreman knew where the employee was at the time the shot was fired, then the question as to whether the quarry operator gave the employee sufficient time to reach a place of safety was comprehended within the issue submitted as to whether the operator knew, or by the exercise of ordinary care could have known, that the employee was likely to be struck by rocks thrown by the explosion.

Pringle v. Carthage Quarry Co. (Mo. App.), 199 Southwestern 561, p. 562.

WILLFUL OPERATIONS—LIABILITY.

A landowner brought an action against a railroad company for damages arising out of blasting operations conducted by the railroad company in its quarry near the lands of the complainant. Under the pleadings it was proper to instruct the jury to find for the plaintiff if from the evidence they concluded that the conduct of the railroad company in carrying on its blasting operations was done willfully and wantonly.

Cobb v. Atlantic Coast Line Ry. Co. (North Carolina), 95 Southeastern 92, p. 93.

DAMAGES FOR INJURIES TO MINERS.

ELEMENTS OF DAMAGES.

EARNING CAPACITY—ABSENCE OF WAGE SCALE.

A coal miner was injured while employed by a coal mine operator to push from the pit mouth to the tippie the loaded cars as they came from the mine below to the tippie. He was paid a wage of \$2 per day for the particular service: but as a miner he could earn at mining from \$6 to \$8 a day and according to his testimony he intended to resume the work of mining but for a temporary suspension in the mine his work as a miner would have continued. His testimony as to what wages he could earn if employed as a miner was not proper where there was nothing to show the general wage scale for miners, or that the injured miner was distinguished by superior capacity over the ordinary miner.

Clark v. Butler Junction Coal Co. (Pennsylvania), 102 Atlantic 952, p. 953.

RECOVERY BY MINOR.

In an action by a boy 14 years of age injured while working in a mine, it is proper for the court to instruct the jury to the effect that in fixing his damages they might consider his ability to earn money and livelihood after he arrived at the age of 21, but that the jury would not be authorized to assess any damages in his favor on account of anything he might be able to earn before he arrived at the age of 21.

Vandalia Coal Co. v. Butler (Ind. App.), 119 Northeastern 34, p. 38.

EXPECTANCY OF BOY.

In an action for damages by a boy 14 years of age employed in a mine it is proper to admit evidence showing what the expectancy of a boy of 14 years of age is.

Vandalia Coal Co. v. Butler (Ind. App.), 119 Northeastern 34, p. 38.

DAMAGES FOR LOSS OF TIME—PLEADING.

In an action by an injured miner for damages no damages for loss of time can be assessed unless specially pleaded.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern 792, p. 793.

EXPENSE OF MEDICAL ATTENTION—CROSS EXAMINATION.

In an action by a miner for injuries, he testified that he first consulted a physician who simply advised the use of a rubber supporter, but gave no other evidence as to medical advice. The complainant having testified as to the extent and character of his injuries, the pain and suffering he endured, the defendant had a right on cross-examination to get from him the fullest particulars both as to what he did and what he failed to do to obtain relief and improvement.

Clark v. Butler Junction Coal Co. (Pennsylvania), 102 Atlantic 952, p. 954.

MATTERS PROPERLY CONSIDERED IN ESTIMATING DAMAGES.

In an action by a miner for damages for injuries sustained while engaged in working as an independent contractor, the court in its instructions properly confined the finding of the jury to the evidence in the case and the amount of damages to such as they would deem "a reasonable compensation" for the injury sustained. The court also properly instructed the jury as against assessing any damages as a punishment of the defendant.

Benoit Coal Mining Co. v. Faught (Alabama), 77 Southern 695, p. 696.

WITNESS IMPROPERLY INFLUENCED.

Where it appears to a court that a witness for the plaintiff in an action by a miner for damages for injuries had been improperly influenced to testify as he did, it is not only the right but it is the duty of the court to order a retrial of the case.

Fuginiti v. Diamond Coal & Coke Co. (Pennsylvania), 103 Atlantic 51.

FRAUD IN PROCURING SETTLEMENT—SUBSEQUENT SUIT—REFUNDING CONSIDERATION.

A miner was injured while in the course of his employment in the operation of a mining machine by compressed air by reason of an excessive quantity of air being turned into the branch pipe that supplied air for his machine without his knowledge, thereby blowing gravel and débris in his face and destroying one eye and injuring the other. Shortly after the injury and before the miner knew the extent of the injury and that one eye was destroyed the physician of the mine operator, an eye specialist, represented to the miner that his eye would be as good as ever in two or three weeks and that he would fix him up all right, and thereupon the injured miner was induced by an agent of the mine operator to execute a release and settlement for his injuries in consideration of the payment of \$84. The mine operator paid the physician employed by him \$69. At

the time the release was signed the plaintiff did not know that his eye was destroyed, but the doctor and the agent who procured the release did know that the sight of one eye was wholly destroyed. On learning the condition of his eye and the fraud practiced in obtaining the release and settlement the miner could maintain an action for damages for the injuries by tendering back to the mine operator the \$84 received by him, but he was not required to return or offer to return the \$69 paid by the mine operator to the physician.

Loveless v. Cunard Mining Co. (Mo. App.), 201 Southwestern 375, p. 378.

DAMAGES NOT EXCESSIVE.

INSTANCES.

A judgment for \$6,000 is not excessive where a miner received an injury that caused the removal of one eye and compelled him to wear an artificial eye; that the injury caused considerable pain and suffering and required him to undergo the operation of removing the eye.

Loveless v. Cunard Mining Co. (Mo. App.), 201 Southwestern 375, p. 379.

A verdict and judgment for \$1,200 for suffering and pain from a flesh wound with no permanent injury shown was not adjudged excessive where the judgment was reversed on other grounds.

Borderland Coal Co. v. Edwards (Kentucky), 199 Southwestern, 792, p. 793.

A verdict and judgment for \$400 is not excessive for injuries to a miner caused by a fall of rock from the roof where the miner's leg was broken below the knee in more than one place and he was permanently crippled.

Carter Fuel Co. v. Filipeck (Kentucky), 201 Southwestern 468, p. 469.

INTERSTATE COMMERCE.

POWER OF STATE TO CONTROL PUBLIC UTILITIES.

When the principle that a State can control public utilities doing business within its boundaries clashes with the principle that a State may not directly impose a burden on interstate commerce, then the principle that a State may not directly interfere with interstate commerce must prevail rather than the principle that the State under all circumstances must have the fullest control over public utilities doing business within its borders.

Landon v. Public Utilities Commission, 245 Federal 950, p. 954.

JURISDICTION OF PUBLIC UTILITIES COMMISSION.

The statute of Illinois (Laws 1913, p. 460, Art. IV, sec. 52) provides that in case of insufficiency of cars at any time to meet all requirements such cars as are available shall be distributed among the several applicants therefor in proportion to their respective immediate requirements without discrimination. The Public Utilities Commission of Illinois under this statute is without jurisdiction to determine whether a rule of a railroad company for the distribution of coal cars was unjust or unreasonable.

State Public Utilities Commission v. Baltimore, etc., R. Co. (Illinois), 118 Northeastern 81, p. 84.

REVIEW OF ORDER OF PUBLIC SERVICE COMMISSION.

An order of the Public Service Commission setting aside a regulation of a railroad company classifying shippers for the purpose of distributing coal cars for shipment on occasion of an imminent shortage in such cars is reviewable by the courts on the question of the reasonableness of the regulation and the character of the discrimination it makes.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 546.

AUTHORITY OF PUBLIC SERVICE COMMISSION—DISTRIBUTION OF COAL CARS.

The Public Service Commission of West Virginia may set aside an unreasonable and unjust regulation made by a railroad company and establish a reasonable and just one in lieu thereof, but this is the extent of the authority conferred by the statute. And authority to annul unreasonable, unjust, and discriminatory regulations and substitute reasonable and just measures for them is not authority to disturb them when they are reasonable, just, and legal. The differ-

ence in the method of loading cars employed by tippie mines whereby open top and hopper cars are loaded quickly, and the method employed by team track loading mines in loading cars from wagons by the hand shovel, occupying a great length of time, together with the difference in the relative volume of coal shipped by each, constitutes a basis for the classification made by a railroad company and is not unjust or unreasonable discrimination and is one with which the Public Service Commission has no authority to interfere or overrule.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 548.

RULE OF RAILROAD COMPANY FOR DISTRIBUTION OF COAL CARS—BASIS AND VALIDITY.

The Baltimore & Ohio Railroad Company, in the matter of its supply of coal cars to mine operators in West Virginia, adopted and entered a rule under which it furnished to team track loading mines—that is, to mine operators engaged in loading coal from wagons and motor trucks—box cars exclusively for intrastate shipments and commerce, and furnished to tippie loaders—that is, operators engaged in loading coal into railroad cars from tipples or other like structures—for intrastate shipment, open top, gondola, or hopper cars. On application the Public Service Commission of West Virginia entered an order requiring the railroad company to cease and desist from this practice and to furnish the team track loading mines for intrastate shipments and commerce the same per cent of open top, gondola or hopper cars to which they were entitled under their allotment as it furnished to tippie loaders. The rule adopted and acted upon by the railroad company was based upon the difference in the method of loading cars and was reasonable and one that the railroad company was justified in adopting and acting upon. The order of the Public Service Commission in requiring the railroad company to cease and desist from its distribution of coal cars to the different classes of mine operators was not within the authority of the Commission to make under the statute of West Virginia, and it was within the jurisdiction of a court to declare the order of the commission invalid.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 548.

POWER OF STATE TO CONTROL DISTRIBUTION OF COAL CARS.

Neither a State statute nor a State public utilities commission has power or jurisdiction to establish a rule for the distribution of coal cars by a railroad company to coal mine operators or to determine whether a rule of the railroad company, engaged in interstate commerce, for the distribution of coal cars to operators is unfair or

whether the rule unjustly discriminates against one class of shippers in favor of another, as that is within the administrative power of the Interstate Commerce Commission.

State Public Utilities Commission v. Baltimore, etc., R. Co. (Illinois), 118 Northeastern 81, p. 84.

DISTRIBUTION OF COAL CARS—REGULATION BY STATE.

The statute of Illinois (Hurd Rev. Stats., 1915-16, chap. 114, sec. 84) requires railroad corporations to furnish cars within a reasonable time for the transportation of property furnished for such transportation. This statute does not impose a direct burden upon interstate commerce, as it only requires a railroad company to furnish cars within a reasonable time after demand; and under the statute a railroad company may be liable for a failure to furnish cars at a coal mine within a reasonable time after the same were required for the transportation of coal.

State Public Utilities Commission v. Baltimore, etc., R. Co. (Illinois), 118 Northeastern 81, p. 82.

DISTRIBUTION OF CARS—CONSTRUCTION OF STATUTE.

The West Virginia statute (Code 1916, ch. 54, sec. 66c) provides that a railroad company along whose line the industry of mining coal is carried on shall without discrimination and without unnecessary delay make a reasonable provision for all coal offered for transportation and shall not discriminate in rates, distribution of cars, or otherwise against or among shippers of coal. The legislation was invoked to prevent discrimination between persons and corporations engaged in the industry and operating mines properly equipped for loading coal to compel reasonable provision for transportation of the coal from such mines. The statute deals with mining industries and requires impartial provision of facilities for them, but it can not be fairly interpreted as requiring equal facilities to persons not regularly engaged in the coal mining nor having the usual and ordinary equipment for mining coal. Its purpose was to promote and encourage efficient coal mining and transportation and not to embarrass or hamper them.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

DISTRIBUTION OF COAL CARS—LIABILITY OF RAILROAD COMPANY.

A railroad company engaged in the performance of interstate commerce may be liable in damages in an action in a State court for failure to furnish a coal company with cars to which it was entitled under a rule established and promulgated by the railroad company. The liability in such case is not based on the ground that the rule of the carrier was unfair, unreasonable, discriminatory, or preferential,

but the liability must arise by reason of the carrier's failure to furnish cars according to its own rule.

State Public Utilities Commission v. Baltimore, etc., R. Co. (Illinois), 118 Northeastern, 81, p. 84.

ALLOTMENT OF COAL CARS—CARS FURNISHED ON SIDINGS.

The Public Service Commission of West Virginia is authorized to enter and enforce an order to the effect that the Baltimore & Ohio Railroad Company is not required to furnish team track loaders with cars of any character upon private sidings connected with its railroad, unless such sidings are owned by the team track loaders, or unless the team track loaders obtain the consent of the owners thereof to use such siding.

Baltimore & Ohio Railroad Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 549.

ALLOTMENT OF CARS FOR COAL SHIPMENTS—OPEN-TOP AND BOX CARS.

Where there is a great shortage of cars suitable for coal shipments, this shortage being occasioned by extraordinary conditions bringing into temporary activity a great many mines that are not equipped with tipples for loading cars, and such mines demand pro rata allotments to them of open-top cars for their shipments, and these cars can not be furnished without serious detriment to permanent and properly equipped mines, to the railroad, and to the general public, a railroad company of which such allotment and distribution are demanded may, by promulgation of a regulation applicable to all such mines, assign and allot its open-top cars to the permanent and properly equipped mines and its box cars to those loading without tipples and loading from wagons and trucks. Such a regulation made under such circumstances is neither unreasonable nor unjustly discriminatory.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 546.

CLASSIFICATION OF MINES—DISTRIBUTION OF OPEN AND CLOSED CARS.

The fact that perhaps 95 per cent of the operating coal mines are equipped with tipples and other means of quick loading into open coal cars, and the remaining 5 per cent are team track loading mines without any equipment or facilities for loading and load from wagons with ordinary hand shovels holding the cars while in process of loading for an unusual length of time, constitutes a sufficient basis for a classification made by a railroad company and justifies the Public Service Commission in upholding the classification. Under such a classification the railroad company may supply to the mines permanently equipped with tipples and equal loading facilities the open-top coal cars and hopper cars that can be loaded in a few minutes, and may supply to the team track loading mines box cars or other

covered cars to be loaded from wagons with hand shovels, although the box cars can not be loaded in this method as rapidly as could the open cars.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 548.

LOADING CARS FROM WAGONS—CLASSIFICATION OF CARS.

Cars placed on side tracks for team loading generally consume the entire day and longer, and necessarily these have to be shifted before loading is completed, in the use of sidings for other purposes, all of which involves loss of time to shippers in the handling of cars for team loading. These facts prove that the operation of team track-loading mines retards and limits transportation of coal to the detriment of properly equipped mines and carriers and the general public, and justifies the assignment of box cars for such purposes as these can be used more advantageously and with less inconvenience at sidetracks in the open country than at tippie mines. Such a classification is founded upon real and substantial differences and puts each class of cars in that branch of transportation in which it can be most efficiently employed, though denying the team track loaders the more convenient and desirable class.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 72.

TEAM TRACK LOADING MINES—DEMAND FOR EQUAL CAR SERVICE DENIED.

Team track loading mines are not equipped for the production and shipment of coal in a manner in which the business is usually conducted. Their methods do not harmonize or correspond with existing and firmly established conditions and they do not contemplate the usual equipment for loading and shipping. For these reasons and because of the delay in the manner of loading them they can not demand as a right under the public service act of West Virginia service and facilities in all respects equal to those afforded properly equipped mines having an established and permanent business. Equal service in the supply of cars involves a disarrangement and impairment of a complex system upon which the efficient operations and functions of two or three great industries vital to the public welfare depend, and the compliance with a demand for equal shipment and convenience in the assignment of cars would involve the introduction of chaotic conditions in mining, transportation, manufacturing, and domestic life. The demand is a means of obtaining mere personal and individual gains as the operators of these team track loading mines embarrass rather than aid the efforts to meet the public demand for coal. Both the carrier and the public utilities commission are justified on refusing the same facilities to this class of operators as are furnished to

mines regularly and permanently equipped for quick loading and rapid transportation.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

TEAM TRACK LOADING—"SNOW BIRD" MINES—DISTRIBUTION OF CARS.

Until recently the team track loading mines constituted a negligible quantity in the mining and shipment of coal, but the demand and high prices for coal has brought many of these mines into existence, each producing only small quantities and a small per cent of the total shipments of coal. Under normal conditions they could not profitably operate and when such conditions are restored their production will doubtless cease, and for these reasons they have been denominated "snow bird" mines or shippers. Ordinarily they do not load more than one car a day and add nothing to the available supply of coal as the regularly equipped mines can produce more than carriers can transport. Less than 60 per cent of the cars demanded for coal transportation can now be supplied on account of the shortage of cars.

Baltimore & Ohio R. Co. v. Public Service Commission (West Virginia), 94 Southeastern 545, p. 547.

TRANSPORTATION OF NATURAL GAS—POWER OF STATE TO REGULATE RATES.

The Public Service Commission of Missouri has no power to suspend schedule rates agreed upon by the receiver of an interstate pipe line transporting natural gas and the distributing companies in the State of Missouri and has no power to establish a new rate for natural gas in cities in the State of Missouri as such acts constitute an attempt to directly interfere with and directly burden interstate commerce and constitutes the taking of property without due process of law.

Landon v. Public Utilities Commission, 245 Federal 950, p. 954.

NATURAL GAS—STORING AND TRANSPORTATION.

The transportation of natural gas from Oklahoma and sale thereof in the State of Missouri constitutes interstate commerce. This status is not changed by the fact that provisions were made for the storage of the gas as that was merely incidental to the transportation and was in fact a necessary incident to the proper and efficient transportation of the gas, and as such storage is merely incidental, it does not change the character of the business from interstate to intrastate commerce.

Landon v. Public Utilities Commission, 245 Federal 950, p. 952.



